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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1058

PHILIP CHUFF,

Petitioner,

—against—

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

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INDEX

PAGE

Opinions and Orders Below 2

Jurisdiction 2

Questions Presented for Review 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 4

POINT I—Failure to make findings of fact after a hearing resulting in a tenured teacher's dismissal render the procedures unlawful, the record not capable of review, and creates a conflict with the due process clause of the Fourteenth Amendment 7

POINT II—Dismissal of a tenured teacher from his position upon charges which included criticism of a Board of Education and participation in elections thereof conflicts with the First Amendment right to free speech as previously construed in applicable decisions of this court 10

POINT III—The evidence in this case was so insubstantial and so insufficient, that it (1) could not support dismissal of a tenured teacher under the grounds provided in the New York Education Law Sec. 3012, Subd. 2, consistent with the guarantee of due process contained in the Fourteenth Amendment to the United States Constitution, and (2) was such a departure from acceptable and usual judicial and administrative procedures as to call for an exercise of the supervisory powers of this court 16

CONCLUSION 18

Table of Cases Cited

PAGE

Brinkerhoff-Faris Trust & Savings Co. v. *Hill,* 281 U.S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930) 7

Chuff v. *Board of Education,* 6 A.D. 2d 937, 175 N.Y.S. 2d 936 5

Chuff v. *Board of Education,* 30 A.D. 2d 590, 290 N.Y.S. 2d 25 16

Chuff v. *Board of Education,* 20 Misc. 2d 1067, 190 N.Y.S. 2d 214 6

Cole v. *Young,* 351 U.S. 536, 76 S. Ct. 861, 100 L. Ed. 1396 (1956) 10

Elite Dairy Products v. *Ten Eyck,* 271 N.Y. 488, 3 N.E. 2d 606 8

Florida v. *United States,* 282 U.S. 194, 51 S. Ct. 119, 75 L. Ed. 291 (1930) 9

Kings County Lighting Co. v. *Maltbie,* 244 A.D. 475, 280 N.Y.S. 560 8

Pickering v. *Board of Education,* — U.S. — 88 S. Ct. 1731, 20 L. Ed. 811 (1968) 14

Story v. *Board of Education,* 19 A.D. 651, 241 N.Y.S. 2d 916 ..... 8, 9

United States v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company,* 294 U.S. 499, 55 S. Ct. 462, 79 L. Ed. 1023 (1935) 9

Wood v. *Board of Education,* 267 A.D. 959, 47 N.Y.S. 2d 221 8

Statutes Cited

PAGE

28 U.S.C. Section 1257(3) 2

U. S. Constitution:

First Amendment 3

Fourteenth Amendment 3

New York Education Law, Section 3012, subd. 2 3

New York Education Law, Section 3012, subd. 2, New York Laws 1947, Chapter 820 as amended by New York Laws 1952, Chapter 407, Section 1.... 3, 8, 10, 16

New York Education Law, Section 3012, subd. 3, New York Laws 1947, Chapter 820 ..... 3, 4

Other Authorities Cited

Davis Administrative Law Treatise, Section 16.05, Vol. 2, P. 444 9

IN THE

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OCTOBER TERM 1968

No. .....

PHILIP CHUFF,

Petitioner,

—against—

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Philip Chuff, hereby petitions for a Writ of Certiorari to review the decision of the New York Supreme Court, Appellate Division, Third Judicial Department, confirming the determinations removing him from his position as a teacher and dismissing his petition for an order reviewing the said determinations of the Commissioner of Education and the Board of Education reinstating him, and annulling the said pr ious determinations.

Opinions and Orders Below

The opinions below, both of the court in which this proceeding was originally brought, and the Appellate Court to which it was transferred, are reported at 20 Misc. 2d 1067, 190 N.Y.S. 2d 214, and 30 A.D. 2d 590, 290 N.Y.S. 2d 936, respectively and are appended hereto, as are the orders entered thereon. Additionally, the opinion of the Tenure Commission of the State of New York (a body no longer in existence under current law), the administrative body reviewing this case for purposes of making a recommendation to the Commissioner of Education, is also appended hereto.

Jurisdiction

The order of the State of New York Supreme Court, Appellate Division, Third Department sought to be reviewed was made and entered on June 21, 1968. An order of the State of New York Supreme Court, Appellate Division, Third Department denying a timely motion for leave to appeal to the highest court in New York, the Court of Appeals was made on September 5, 1968 and entered September 13, 1968. An order of the State of New York Court of Appeals denying a timely motion for leave to appeal to that court was made and entered on November 20, 1968. The statutory provision believed to confer on this Court jurisdiction to review the order in question is 28 U.S.C. Sec. 1257(3).

Questions Presented for Review

1. Whether the procedures were rendered unlawful, the record incapable of review and a tenured teacher's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution was denied, by the failure of a board of education upon dismissal of a tenured teacher to make any findings of fact after an extensive hearing.

2. Whether a local board of education and superintendent of schools can infringe upon a tenured teacher's right of free speech as guaranteed by the First Amendment to the United States Constitution by procuring his dismissal upon charges which chiefly included alleged misconduct consisting of alleged criticism of the board of education and participation in elections thereof.

3. Whether the evidence in this case was so insubstantial and so insufficient, that it (1) could not support dismissal of a tenured teacher under the grounds provided in the New York Education Law Sec. 3012, subd. 2 consistent with the guarantee of due process contained in the Fourteenth Amendment to the United States Constitution, and (2) was such a departure from acceptable and usual judicial and administrative procedures as to call for an exercise of the supervisory powers of this court.

Constitutional Provisions and Statutes Involved

Amendment I, United States Constitution:

> "Congress shall make no law * * * abridging the freedom of speech * * *."

Amendment XIV, United States Constitution, Section 1, Clause 2:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

Education Law, Section 3012, Subdivision 2, New York Laws 1947, Chapter 820, as amended by New York Laws 1952, Chapter 407, Section 1:

> "* * * all others employed in the teaching, examining or supervising service of the schools * * * shall hold their respective positions during good behavior

> and efficient and competent service, and shall not be removed except for any of the following causes: (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty. * * * "

Education Law, Section 3012, Subdivision 3, New York Laws 1947, Chapter 820:

> "* * * After each side has completed its case at the hearing, the board of education may by majority vote dismiss said teacher from its service, or may defer action regarding the decision for a period not to exceed five days. Provided, however, the teacher shall have a right to make an appeal both as to law and fact to the tenure commission as hereinafter described. * * * The tenure commission shall by a majority vote make its recommendation to the commissioner of education. The decision of the commissioner of education shall be final."

Statement of the Case

On December 9, 1957, through December 19, 1957, a hearing was held before the respondent, Board of Education, for the purpose of taking testimony on charges preferred by the Superintendent of Schools, respondent, John F. Murphy, against petitioner, Philip F. Chuff (R. 6-490) a physical education teacher who had acquired tenure by estoppel because the superintendents of his school district made it a practice not to recommend teachers for tenure or notify them that they were not recommended according to law (R. 97-102, 170-173, 350-355).

The respondents had previously attempted to dismiss petitioner in contravention of *New York Education Law, Section 3012,* and petitioner obtained reinstatement through

the Courts. See *Chuff* v. *Board of Education,* 6 A.D. 2d 987, 175 N.Y.S. 2d 936.

The school system was in the midst of a building program at the time and there were no gymnasiums or athletic fields which an athletic program could be conducted or developed on (R. 107-113, 216-220, 370-372, 380-382).

It might also be pointed out that the school district at the time was in a political turmoil as the result of the release of respondent-Murphy's predecessor (See the Record generally and R. 308-325 in particular).

Additionally, the testimony of several witnesses was of doubtful credibility, Mr. Murphy being an admitted convicted forger, thief, and extortionist (R. 134-137, 145-148). Mr. Beha being an incompetent administrator fired from his job (R. 183-191), as Superintendent of the district who did not like petitioner's aggressiveness in improving the system and who felt he had been fired because of petitioner (R. 169-173, 177-180, 183-191), and Mr. D'Amelio being interested only in getting business from the school system which he was supposed to be serving as a public official (R. 281).

After the hearing, respondent, Board of Education rendered its decision on December 21, 1957, dismissing petitioner without making any specific findings as to which charges had been sustained by the proofs, what petitioner had been found guilty of, or any other indication of why petitioner was dismissed (R. 594-595).

The petitioner took an appeal to the Tenure Commission (R. 596-597) which affirmed and recommended the same to respondent Commissioner of Education (R. 598-609). The Commissioner of Education affirmed (R. 610-611) and this proceeding was brought in the Supreme Court of Albany County to review the Commissioner's decision (R. 502-558)

which transferred the proceeding to the Appellate Division after finding that there were issues as to substantiality of the evidence and whether or not findings of fact were required that should be decided by the Appellate Division. *Chuff* v. *Board of Education*, 20 Misc. 2d 1067, 190 N.Y.S. 2d 214 (R. 490-501). The Appellate Division affirmed the determination of the Board of Education and Commissioner on May 20, 1968 (Appendix C and D) and denied without opinion petitioner's motion for permission to appeal to the Court of Appeals on September 5, 1968 (Appendix B).

The Court of Appeals of the State of New York also denied without opinion petitioner's timely motion for permission to appeal to the said Court of Appeals on November 20, 1968 (Appendix A).

The federal question concerning the abridgment of petitioner's right to free speech with respect to his participation in school board elections was raised in substance by petitioner himself in his testimony in the hearing before the school board (R. 413-414) and in his formal answer to the charges against him R. 589-591), and additionally were raised by his present counsel in the briefs and arguments heretofore had before the State of New York Supreme Court, Appellate Division, Third Judicial Department and the Court of Appeals.

The federal question concerning the denial of due process by the school board's failure to make findings of fact was raised by the petitioner before the Tenure Commission (R. 604-609), before the Albany County Supreme Court (R. 516-523), and in the briefs and arguments heretofore had before the State of New York Supreme Court, Appellate Division, Third Judicial Department, and the Court of Appeals.

The question whether the evidence at the hearing before the school board was substantial enough to warrant dis-

missal of a tenure teacher on the statutory grounds allowed was raised by petitioner in his answer to the charges (R. 581-593), his testimony at the hearing (R. 355-486), before the Tenure Commission (R. 603-604), before the Supreme Court of Albany County (R. 511-523), and in the briefs and arguments heretofore had before the State of New York Supreme Court, Appellate Division, Third Judicial Department, and the Court of Appeals.

The State of New York Supreme Court, Appellate Division, Third Judicial Department did not expressly pass upon the constitutional issues raised, though, of course, it could not have affirmed the determination of the Commissioner of Education without resolving the constitutional questions against the petitioner. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673 (1930). Additionally, the Tenure Commission, upon whose recommendation the Commissioner of Education affirmed petitioner's dismissal resolved the constitutional question concerning the requirement of findings of fact adversely to the petitioner (Appendix G).

POINT I

Failure to make findings of fact after a hearing resulting in a tenured teacher's dismissal render the procedures unlawful, the record not capable of review, and creates a conflict with the due process clause of the Fourteenth Amendment.

No specific findings of the guilt or innocence of the petitioner to the charges preferred against him were ever made by the Board of Education. Only the general conclusory statement that "the credible evidence sustains the charges." But what "credible evidence" sustained which "charges"?

It has been petitioner's contention from the very beginning that the Board's decision was defective, unlawful, and

a violation of his constitutional rights to due process since there were no findings of fact as to whether specific charges were sustained by the evidence and if so, whether guilt of such charges constituted grounds under the statute for his dismissal.

New York Education Law, Section 3012, subd. 2, specifies the grounds or causes for removal of a tenured teacher as "(a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty." Certainly it was incumbent upon the Board to specify that certain facts proved that Mr. Chuff was guilty of one or more of the statutory grounds where these were the only grounds upon which he could be dismissed. The finding of fact that Mr. Chuff committed acts which constituted one or more of the causes of dismissal specified by the statute is jurisdictional and essential. Where a record of an administrative hearing of the Public Service Commission showed a complete absence of basic or essential findings of fact, its order based thereon were held void in *Kings County Lighting Co.* v. *Maltbie,* 244 A.D. 475, 280 N.Y.S. 560. And, in *Elite Dairy Products* v. *Ten Eyck,* 271 N.Y. 488, 3 N.E. 2d 606, the Court annulled a determination of the Commissioner of Agriculture denying an application for a license to sell milk because such denial was not based on findings made by the Commissioner. Certainly, the dismissal of a teacher is as important as such cases and the failure to inform him of what he was guilty of fatally infects the proceedings in this case.

As a matter of fairness and due process, findings of fact were required in this case. How can a reviewing court determine this matter if it has no knowledge of what was determined in the proceedings below? It has been held that such findings must be made by boards of education when dismissing a teacher. *Story* v. *Board of Education,* 19 A.D. 2d 651, 241 N.Y.S. 2d 916; *Wood* v. *Board of Education,* 267

A.D. 959, 47 N.Y.S. 2d 221. In *Story* v. *Board of Education, supra,* the Court stated in annulling the Board's determination on the law, that a proper review could not be made by it, nor the seriousness of the petitioner's alleged derelictions be properly evaluated, in the absence of a written decision showing the grounds of the Board's decision and setting forth seriatim the Board's specific findings of fact with respect to each charge.

Such findings are the only assurance to the parties concerned that decisions are based upon evidence of record and were not reached arbitrarily or influenced by extra legal considerations.

In a leading treatise on the subject of administrative law, it is stated that the practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement. *Davis, Administrative Law Treatise,* Section 16.05, Vol. 2, P. 444.

This court has most often been involved with review of decisions of administrative agencies of the federal government. In order to do so it has been held that, for example, an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company,* 294 U.S. 499, 55 S. Ct. 462, 79 L. Ed. 1023 (1935); *Florida* v. *United States,* 282 U.S. 194, 51 S. Ct. 119, 75 L. Ed. 291 (1930).

The requirement is not only to aid judicial review, but to prevent arbitrary action and to assist parties in preparing their case for judicial review. The petitioner in this case was certainly the victim of very arbitrary school board action and was hindered and continues to be hindered in preparation of his case for review.

Further, it has been held that findings should be made in order to assure that an administrative body stays within its jurisdiction. *Education Law Section 3012, Subd. 2 (New York)* sets forth the grounds for dismissal of a tenured teacher and no finding was ever made by the Board of Education that petitioner committed acts which constituted the statutory grounds. This court in *Cole* v. *Young,* 351 U.S. 536, 76 S. Ct. 861, 100 L. Ed. 1396 (1956) in a case where a federal employee was dismissed under a statute which provided for a summary dismissal upon the ground of "national security" reversed the dismissal where no determination or finding was made that the employee's acts and his position affected the "national security" as required by statute. The case is directly in point on the principle that any administrative body which acts under a statute must make findings which conform to the statute under which it is operating. Anything less is a violation of the due process clause of the Fourteenth Amendment.

Thus, it is respectfully submitted that this petitioner was dismissed from his position unconstitutionally and a full review should be allowed in this court.

POINT II

Dismissal of a tenured teacher from his position upon charges which included criticism of a Board of Education and participation in elections thereof conflicts with the First Amendment right to free speech as previously construed in applicable decisions of this court.

Paragraphs 20-25 of the charges against Mr. Chuff were as follows:

> "20. Upon information and belief, the said Philip Chuff has engaged in conduct unbecoming a teacher in that he has at various times and places accosted members of the Board of Education and in the pres-

ence of others, severely criticized their program and particularly on December 6th, 1956, in the presence of faculty members. Mr. Chuff sharply criticized both the Board of Education and the Administration to the detriment of the school system with such comments as 'The program is going backwards every day', and 'He (Mr. Murphy, the Superintendent of Schools) allowed the use of ineligible players in football', and 'The administration is not supporting me in basketball'. That on December 14th, 1956, a similar outburst was made by said Chuff to a Board member that they made a mistake in hiring the new Superintendent, and he (Chuff) would fight him every inch of the way. Both of these outbursts were the object of Board discussions and resulted in a special meeting being called under date of December 18, 1956. The source of my information and the grounds of my belief are conversations with former members of the Board of Education and the minutes of the Board Meeting of December 18th, 1956.

21. That upon information and belief, the said Philip Chuff, during February of 1956, criitcized members of the Board of Education in their thinking and action with respect to salary scale, then under consideration, stating that he considered the actions of the Board of Administration to be shortsighted and discriminatory. That the source of my information and grounds of my belief are conversations with former members of the Board of Education.

22. That upon information and belief, Mr. Philip Chuff has incorrectly maintained that he has not had support from the Board of Education in such a manner as to provide an adequate program, all to the detriment of the school system. That said statements were made to members of the Board of Education, particularly on December 6th, 1956, December 14th, 1956, and December 18th, 1956. That the source of

my information and grounds of my belief are partly on conversations with others and partly from the records and reports in the school system.

23. That said Philip Chuff, on many occasions, and particularly on May 6th, 1957, in the Superintendent's office, directly and openly criticized the school organization and school operation in abusive and uncontrolled language.

24. That the said Philip Chuff is constantly and has repeatedly demonstrated an attitude of resisting the school program and attempting to belittle it and to be of as little assistance as possible, openly and publicly criticizing the board of Education and the school administrators, and particularly on December 14th, 1956, when he criticized the principal of the school and later left the school without the knowledge of the principal and as a further indication of this attitude, the said Mr. Chuff resigned as football coach just a few days before the opening of the football season in the Fall of 1956 without notice.

25. That upon information and belief, the said Philip Chuff in May or June, 1955, attempted to influence voting support at the annual meeting of the Board of Education, promising considerations which would be beneficial to those people involved, disregarding the best interests of the school system, specifically stating that if his candidates were elected, he, Chuff, might be appointed Superintendent of Schools and would continue support of private bus contracts as against school owned buses. That the source of my information and grounds of my belief are the statements of individuals who have reported this to the Superintendent."

The charge that Mr. Chuff actively participated in a school board election certainly is no grounds for dismissal of a teacher on tenure. As to misconduct during such

election, Mr. Murphy, whose testimony was all of the evidence on this charge, admitted that Mr. Chuff committed no acts of personal impropriety or misconduct, admitted that he had no knowledge of any misconduct of Mr. Chuff's during the election campaign. More specifically, Mr. Murphy admitted that everybody in the area was electioneering and stated that it was Mr. Chuff's privilege to do so (R. 91-92). Mr. Chuff denied any impropriety (R. 413-417). The Tenure Commission held this charge to be insubstantial or not supported by the evidence (R. 604).

These charges that Mr. Chuff criticized the administration and school board at various times and places are clearly unsubstantial. The First Amendment to the United States Constitution guarantees every citizen the right to speak his mind within the bounds of defamation, sedition, and obscenity. It is every citizen's right to criticize public officials, and that right has been upheld by this court in numerous cases. It is respectfully submitted that a teacher has every right as a citizen to criticize elected and appointed public officials including a school board and the Superintendent of schools without subjecting himself to be dismissed for insubordination or conduct unbecoming a teacher. If those terms are so vague as to prohibit a teacher from criticism of public officials then they are unconstitutionally vague as allowing the suppression of constitutionally protected speech.

It is also respectfully pointed out that the Tenure Commission itself held that Charges #21 and #22 were unsubstantial or not supported by competent evidence. Mr. Chuff's testimony also supported his position that he was no more critical of the administration and Board than others in the community.

This whole action is chiefly concerned with these unsupported charges. The others, smoking, alleged lack of

supervision, etc., were only trivial things added to beef up the main charges against Mr. Chuff, that being his criticism of the School Board and his superiors when he felt that administrative decisions were not being properly made.

Appropos of this subject, this court in the recent case of *Pickering* v. *Board of Education,* — U.S. —, 88 Sup. Ct. 1731, 20 L. ed. 2d 811 (1968), has held that absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. In that case, as in the instant action, there was no proof in the record that any false or erroneous statements attributed to the teacher were knowingly and recklessly made.

In the *Pickering* case, the conduct was much more serious than that attributed to petitioner herein. The teacher in that case sent a letter, which was published in the newspaper, in connection with a recently proposed tax increase, that was critical of the way in which the school board and district superintendent of schools had handled past proposals to raise new revenue for the schools. The letter attacked the school board's handling of bond issue proposals and its subsequent allocation of financial resources between the school's educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Illinois Courts, in *Pickering,* reviewed the proceedings chiefly to determine whether the Board's findings were supported by substantial evidence, as in the instant action. Mr. Pickering's claim that his letter was protected by the First Amendment was rejected as was Mr. Chuff's in the instant action. This court stated in this regard that teachers

may not constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. This court in *Pickering* reversed the decision of the state court and remanded for proceedings not inconsistent with its opinion, holding that absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

Petitioner's case herein is most certainly now controlled by this decision since the facts are almost identical as regards the suppression of a teacher's constitutionally protected right of free speech.

Thus, it is respectfully submitted that the dismissal of petitioner in this action was as wrongfully and unconstitutionally perpetrated as in *Pickering,* and that this court should consider that that case states the controlling law. There are, therefore, compelling reasons that this court should permit a full appeal since it is respectfully submitted that an important issue of free speech was resolved below in a way not in accord with the applicable decision cited above, and other decisions of this court construing the right of free speech.

POINT III

The evidence in this case was so insubstantial and so insufficient, that it, (1) could not support dismissal of a tenured teacher under the grounds provided in the New York Education Law, Sec. 3012, Subd. 2, consistent with the guarantee of due process contained in the Fourteenth Amendment to the United States Constitution, and (2) was such a departure from acceptable and usual judicial and administrative procedures as to call for an exercise of the supervisory powers of this court.

The State of New York Supreme Court, Appellate Division, Third Judicial Department, in its opinion, *Chuff* v. *Board of Education,* 30 A.D. 2d 590, 290 N.Y.S. 2d 25, stated that the record as a whole contained substantial evidence which cumulatively warranted the dismissal of the petitioner and that the action of the Commissioner was not arbitrary or capricious.

Petitioner respectfully submits that there was no evidence submitted to the respondent, Board of Education which would in any way support any of the grounds for dismissal set out in *Education Law, Section 3012, subd. 2* (New York) *i.e.,* insubordination, immoral character or conduct unbecoming a teacher; inefficiency, incompetency, physical or mental disability, or neglect of duty.

The petitioner respectfully requests that the court examine the record on file herein. The cumulation of many frivolous, trivial, untrue, and unproved charges cannot add up to substance, no matter how many of them there are. No matter how many times zero is multiplied, the result is the same, zero. The credible evidence countered all of the charges, many items of which were unproven and untrue except for the bare allegations contained in the charges. Upon a full appeal your petitioner will show a detailed charge by charge analysis that there was no substantial

evidence and that the procedure was so defective as to require this court to exercise its supervsory power and require a new hearing.

The record itself is replete with testimony as to Mr. Chuff's honesty, integrity, ability and success as a teacher and as a coach. The chief witnesses against him were a self-admitted, convicted forger, faker of orders and receiver of kickbacks, and an incompetent administrator who thought Mr. Chuff had obtained his dismissal. The record surely does not contain substantial evidence that would support any of the statutory grounds for dismissal of a teacher on tenure.

In conclusion, it is submitted that in view of the above, this court should and very possibly will reverse the decision of the State of New York Supreme Court, Appellate Division, Third Judicial Department herein, and reinstate petitioner, or in the alternative, order a new hearing. Moreover, the constitutional questions involved herein, and ignored by the Board of Education, the Tenure Commission, the Commissioner of Education, and the Appellate Division, which require reversal herein, must be decided as they are important and urgent questions involving academic and personal freedom.

CONCLUSION

This court should grant certiorari, and the order below dismissing petitioner's petition for reinstatement should be reversed, with petitioner reinstated to his position in the respondent school district with back pay and the costs and disbursements of this action.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

PAGE

A. Order of Appellate Division, Third Department Dismissing Petition (Order Appealed From) 1a

B. Opinion of Appellate Division, Third Department in Dismissing Petition 3a

C. Order of Supreme Court, Albany County, Transferring Case to Appellate Division 4a

D. Opinion of Supreme Court, Albany County 6a

E. Opinion of Tenure Commission 12a

F. Order of Appellate Division, Third Department Denying Leave to Appeal to the Court of Appeals.... 20a

G. Telegram sent by Clerk of Court of Appeals as to Decision of Court of Appeals 22a

H. Order of Court of Appeals Denying Leave to Appeal to Court of Appeals 23a

APPENDIX A

Order of Appellate Division, Third Department, Dismissing Petition (Order Appealed From)

(ORDER OF AFFIRMANCE)

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Courthouse in the City of Albany, New York, commencing on the 22nd day of April, 1968.

Present: HON. JAMES GIBSON,
Presiding Justice.

HON. J. CLARENCE HERLIHY,
HON. FELIX J. STALEY, JR.,
HON. DOMENICK L. GABRIELLI,
Associate Justices.

In the Matter

—of—

the Application of PHILIP CHUFF, Petitioner, for an Order under Article 78 of the Civil Practice Act,

—against—

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 of the Towns of Frankfort and Schuyler, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,

Respondents.

The above-entitled proceeding under Article 78 of the CPLR (transferred to this Court by order of the Supreme

Appendix A

Court at Special Term Albany County) to review a determination of the Commissioner of Education dated February 4th, 1959, which affirmed the determinations of the State Tenure Commission and the Board of Education of Central School District #2 of the Towns of Frankfort and Schuyler, removing Petitioner from his position as a school teacher, and said proceeding having been argued by Lewis C. DiStasi, Jr., Esq. of counsel for the Petitioner-Appellant and by John P. Jehu, Esq., of counsel for the Respondent, Commissioner of Education, and by Charles E. Crandall, Jr., Esq. of counsel, for the respondent, Board of Education, Central School District #2 of the Towns of Frankfort and Schuyler and John F. Murphy, Superintendent, and after due deliberation the Court having rendered a decision on the 20th day of May, 1968, it is hereby

ORDERED that the aforesaid determination of the Commissioner of Education be and the same hereby is confirmed, without costs, and the petition be and the same hereby is dismissed.

Enter:

s/ JOHN J. O'BRIEN,
Clerk.

Dated and Entered: June 21, 1968

A TRUE COPY

/s/ JOHN J. O'BRIEN,
Clerk.

APPENDIX B

Opinion of Appellate Division, Third Department in Dismissing Petition

(MEMORANDUM BY THE COURT)

May 20, 1968. 12309

In the Matter

— of —

PHILIP CHUFF,

Petitioner,

—v—

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, et al.,

Respondents.

Article 78 proceeding transferred to this court by order of Special Term.

The Petitioner was removed from his position as a school teacher in the respondent Board of Education's school system in 1957 pursuant to section 3012 of the Education Law. The proceeding was reviewed by the Tenure Commission and it recommended to the Commissioner of Education that the removal be upheld. In 1959 the Commissioner duly found that the removal was proper. In 1960 the petitioner obtained the order transferring the proceeding to this court, but did not enter the order until December of 1967.

We find that the record as a while contained substantial evidence which cumulatively warranted the dismissal of the petitioner and that the action of the Commissioner was not arbitrary and/or capricious.

Determination confirmed, without costs, and petition dismissed.

GIBSON, P.J., HERLIHY, AULISI, STALEY, JR. and GABRIELLI, JJ., concur in memorandum by the court.

APPENDIX C

Order of Supreme Court, Albany County, Transferring Case to Appellate Division

At a Special Term of the Supreme Court held in and for the County of Albany at the Court House in the City of Albany, on the 29th day of June, 1959.

Present: HON. HERBERT D. HAMM,
Justice Presiding.

STATE OF NEW YORK, SUPREME COURT

COUNTY OF ALBANY

In the Matter

— of —

the Application of PHILIP CHUFF,

Petitioner,

For an Order under Article 78 of the Civil Practice Act

—against—

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,

Respondents.

The above named petitioner having applied to this Court for an Order pursuant to Article 78 of the Civil Practice Act to review the determination made by the respondents, dismissing the petitioner from his employment as a teacher in the schools of the respondent Board of Education, which

determination was made after a hearing held, at which evidence was taken, pursuant to statutory direction, and seeking the reinstatement of the petitioner to his employment as a teacher in the public schools of the respondent school district, and said application having duly come on to be heard before this Court on the 29th day of June, 1959.

Now on reading and filing the notice of motion herein, and the verified petition of Philip Chuff, and the answer of the respondent Board of Education of Central School District #2 of the Towns of Frankfort and Schuyler and John F. Murphy, Superintendent of Schools, and the answer of the respondent James E. Allen, Jr., as Commissioner of Education of the State of New York, and the reply of the petitioner Philip Chuff, and the affidavits and exhibits annexed to such papers, and after hearing Fred J. O'Donnell, attorney for the petitioner in support of said application, and Charles A. Brind, attorney for the respondent Commissioner of Education by John P. Jehu of counsel, and Albert L. Lawrence, Attorney for the Board of Education of Central School District #2, Towns of Frankfort and Schuyler, Herkimer County, and John F. Murphy, by Daniel J. Blaugrund of counsel, in opposition to said application, and due deliberation having been had thereon, it is

ORDERED, that this proceeding be, and the same hereby is transferred for disposition, to a Term of the Appellate Division of this Court for the Third Judicial Department pursuant to the provisions of the Civil Practice Act.

s/ HERBERT D. HAMM,
Justice of the Supreme Court.

Dated Troy, New York
January 4, 1960.

APPENDIX D

Opinion of Supreme Court, Albany County

STATE OF NEW YORK, SUPREME COURT

COUNTY OF ALBANY

In the Matter

—of—

the Application of PHILIP CHUFF,

Petitioner,

For an Order under Article 78 of the Civil Practice Act

—against—

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,

Respondents.

(Supreme Court, Albany County Special Term,

June 29, 1960

(Justice Herbert D. Hamm, Presiding)

APPEARANCES:

FRED J. O'DONNELL, ESQ.,
Attorney for Petitioner.

CHARLES A. BRIND, ESQ.,
(John P. Jehu, Esq., of counsel),
Attorney for Respondent,
Commissioner of Education.

Appendix D

ALBERT L. LAWRENCE, ESQ.,
(Daniel J. Blaugrund, Esq., of counsel),
Attorney for Respondents,
Board of Education of Central
School District No. 2, Towns
of Frankfort and Schuyler, Herkimer
County, and John F. Murphy.

MEMORANDUM

HAMM, *J.*,

The petitioner is a teacher. By a written statement dated November 7, 1957, the Superintendent of Schools initiated a disciplinary proceeding against him. The written statement comprised thirty-six separately numbered allegations characterized as "charges". After hearings conducted on several days the Board of Education stated in writing: " * * * it is the unanimous decision of the members of the Board of Education hearing this matter that the credible evidence sustains the charges and that said Philip Chuff * * * be dismissed as a teacher in said school district". No findings of fact were made which would show the particular matter determined against the petitioner herein.

Subdivision 3 of Section 3012 of the Education Law as pertinent provides:

> " * * * At the time and place set the issues shall be heard. Each witness shall be required to take oath or affirmation before an officer of the Board of Education. At such hearing, which shall be private or public at the discretion of the teacher, each party shall have the privilege of being represented by counsel. It shall be the duty of said board of education to employ a competent stenographer to keep and transcribe a record of the proceedings at such hearing. After each side has completed its case at the hearing, the board of education may by a majority

vote dismiss said teacher from its service, or may defer action regarding the decision for a period not to exceed five days. Provided, however, the teacher shall have a right to make an appeal both as to law and fact to the tenure commission as hereinafter described. If said appeal is not made in ten days after dismissal, the decision of the board of education shall be final. In said appeal the teacher shall submit the case on the evidence as recorded in the hearing before the board of education. The tenure commission shall proceed in the same manner as the board of education, setting the date of said hearing not less than ten or more than thirty days after notice of such an appeal shall have been received. The tenure commission shall by a majority vote make its recommendation to the commissioner of education. The decision of the Commissioner of Education shall be final."

An appeal was made to the Tenure Commission. The Tenure Commission stated that it regarded eight of the charges as unsubstantial or as not established by competent evidence and that another charge that the petitioner had not acquired tenure was "manifestly erroneous and insufficient on its face as a matter of law". For its recommendation the Tenure Commission concluded " * * * the members of the Commission participating in this decision unanimously recommend that the determination of the Board be affirmed." The Commissioner said: "Upon an examination of the record in this proceeding, it appears that there is no basis for substitution of my judgment for that of the Board of Education and the Tenure Commission. It is ORDERED that the recommendation of the Tenure Commission be affirmed."

Appendix D

Section 3012 states that the "decision of the commissioner of education shall be final." It does not require, as does Section 310 of the Education Law, that the Commissioner's decision shall be "not subject to question or review in any place or court whatever", nor does it state, as does Section 2037, that the Commissioner's decisions shall be "not subject to review". Although it has been held that Section 310 does not prevent judicial review to the extent of determining whether the Commissioner was purely arbitrary (Mtr. of Bd. of Educ. of City of N.Y. v. Allen, 6 N.Y. 2d 127), some doubt has been expressed as to whether Section 2037 permits review to the extent that review may be had in a case arising under Section 310 (Matter of Colson v. Allen, 285 App. Div. 797, 798; Matter of Kuhn v. Comr. of Educ., 1 A.D. 2d 533, 537, appeal dismissed 2 N.Y. 2d 749). In Matter of Eaton v. Allen, 1 Misc. 2d 496, the determination of the Commissioner after an appeal under Section 2037 was annulled but the annulment was based on interpretation of an underlying statute (CF. Matter of Ross v. Wilson, 308 N.Y. 605). In Matter of O'Brien v. Comr. of Educ., 3 A.D. 2d 321, appeal dismissed 4 N.Y. 2d 140, motion for reargument denied 6 N.Y. 2d 882, the proof failed to demonstrate that the Commissioner's decision was arbitrary and consequently the question was not reached. In the absence of any restrictive language in Subdivision 3 of Section 3012 qualifying the finality of the Commissioner's decision, the issue is whether the Commissioner's decision was supported by substantial evidence.

It seems clear that this Article 78 proceeding to review the Commissioner's decision should be regarded as one in the nature of certiorari, rather than mandamus. (Mtr. of Irving v. Finger Lakes, Comm., 12 Misc. 2d 1087, 1088-1089). This is a proceeding to scrutinize the judicial determination of the Commissioner after his judicial examination of evidence as the result of a hearing held, at which evidence was taken pursuant to statutory requirement after an oppor-

tunity to be heard and to present evidence had been afforded. Issues as to whether the charges were supported by substantial evidence are raised under Subdivisions 6 and 7 of Section 1296 of the Civil Practice Act and transfer to the Appellate Division is indicated.

The Commissioner urges the petitioner's appeal to him was not only under Section 3012 but also under Section 310 of the Education Law and that the only issue is whether the Commissioner was arbitrary. If this were so, the issue would be not whether the charges were supported by substantial evidence, but whether a reasonable man could find that they were supported by substantial evidence. It is indisputable that the appeal under consideration was taken under and pursuant to Section 3012. The caution exercised in limiting review of the Commissioner's decisions when they are by statute "not subject to question or review in any place or court whatever" is not required when there is no such statutory limitation. In fact, the deliberate omission of statutory restriction of the right to review so manifests.

The petitioner, stating that this proceeding should be transferred urges that there is a preliminary question of law to be determined by Special Term. He says that the Board's conclusory determination that the credible evidence sustained the charges was insufficient as a matter of law and that he was entitled to findings which would show more precisely what was determined against him. Findings, however, are not mandatory in all situations. It has been said (Matter of McCall Corp. v. Gerosa, 2 A.D. 2d 358, 361): "The court should not be required to speculate as to the reason for the administrative ruling. (See Securities Comm. v. Chenery Corp., 332 U.S. 194; Matter of Barry v. O'Connell, 303 N.Y. 46)". On the other hand in Matter of Stolz v. Board of Regents, 4 A.D. 2d 361, the determination was confirmed and it was said at page 365: "It is true that a

statement of reasons would be helpful to the court in any case, in the exercise of its newly granted power to review or measure of punishment, but we cannot insist upon a statement of reasons when there is no apparent disproportion between the nature of the offense and the extent of the punishment. It may fairly be assumed, without any explicit statement to that effect, that the board selected the particular measure of discipline because it believed it to be appropriate to the nature of the offense." In Matter of Piper v. Lubin, 4 A.D. 2d 812, 813, wherein the absence of findings required annulment and remission, the Court stated: "Here, some factual evaluation was required. The matter of punishment to be passed upon by us, pursuant to the authority lately conferred (Civ. Prac. Act § 1296, subd. 5-a) cannot be reviewed without at least an expression of conclusions and reasons and a record of factual content sufficient to support them, since the inherent nature of the offenses does not necessarily demand such stringent punishment. (See Matter of Stolz v. Board of Regents, 4 A.D. 2d 361)."

In this case it will be for the Appellate Division to decide whether the record is such as to be reviewable without the findings which the petitioner contends should have been made.

Submit order of transfer in accordance herewith. The pleadings, affidavits and exhibits will be forwarded with the signed order.

Dated at Troy, New York, August 19th, 1959.

APPENDIX E

Opinion of Tenure Commission

STATE TENURE COMMISSION

In the Matter

—of—

the Removal of PHILIP CHUFF,

As a Teacher in Central School District #2 of the Towns of Frankfort and Schuyler

Argued June 30, 1958

COMMISSIONERS:

JOHN T. DE GRAFF, *Chairman*
MRS. ROBERT CURTIS OSBORN
MRS. HOMER BUNNELL
WILLIAM T. CONKLIN
ALFRED T. PETERS

APPEARANCES:

FRED J. O'DONNELL,
Attorney for Appellant.

ALBERT L. LAWRENCE,
Attorney for School District,

DANIEL J. BLAUGRUND,
of Counsel.

RECOMMENDATION:

This is an appeal, pursuant to Section 3012 of the Education Law, from a determination of the Board of Educa-

tion of Central School District #2 of the Towns of Frankfort and Schuyler, dismissing the appellant, Philip Chuff, as a teacher in said School District. The unanimous determination of the five members of the Board who conducted the hearing, was made on December 31, 1957, following hearings held on December 9, 10, 11, 16, 17, 18 and 19, 1957. The notice of appeal, dated December 28, 1957, was received by the Tenure Commission on or about January 4, 1958.

The Tenure Commission was notified in a letter from the attorney for the petitioner, dated January 15, 1958, that the preparation of the transcript of the testimony taken before the Board would be delayed and that the Tenure Commission would be informed of the date of completion of the record so that a hearing could then be scheduled. The Commission was subsequently informed, by letter dated June 5, 1958, that the record had been completed and that the parties were ready to proceed with the hearing.

The hearing was held in Albany on June 30, 1958 and the issues were argued by Fred J. O'Connell, Esq., 53 West Street, Ilion, New York, on behalf of appellant, and by Daniel J. Blaugrund, Esq., 273 West Main Street, Herkimer, New York on behalf of respondent.

Before the hearing, the attorneys for the respective parties stipulated as follows:

1. That the provisions of Section 3012 of the Education Law, which require that the hearing before the Tenure Commission shall be held "not less than ten nor more than thirty days after notice of such an appeal has been received" are waived by the respective parties and the parties consent that the hearing be held on June 30, 1958.

2. That the issues may be submitted to and determined by the full membership of the Tenure Commission, despite

the inability of two members to attend the hearing, on the basis of the record filed with the Tenure Commission as hereinafter set forth in paragraph 4.

3. That any time limitations that might exist in relation to the filing of the determination of the Tenure Commission are waived by the parties who expressly agree that the Tenure Commission may have such time as may be necessary for the filing of its recommendations with the Commissioner of Education.

4. That the issues are to be submitted to and determined by the Tenure Commission on the following record as submitted by the respective parties:

a. Notice of Appeal;

b. Charges;

c. Notice of suspension;

d. Answer;

e. Decision;

f. Transcript of testimony before the school board;

g. Plaintiff's exhibits numbered 1 to 23 inclusive;

h. Defendant's exhibits numbered A to V inclusive (Defendant's Exhibit W could not be found by either of the parties to the appeal).

The proceeding which is the subject of this appeal was initiated by charges dated November 7, 1957, made by John F. Murphy, Superintendent of Schools of Central School District No. 2. They comprise thirty-six separate numbered allegations characterized as "charges". Charges 1 and 2 are general in nature. The others are specific and could

more properly be termed specifications in support of the general allegations contained in the first two charges.

The first charge alleges that appellant was guilty of inefficiency, incompetency, neglect of duties, insubordination, and conduct unbecoming a teacher.

The second charge alleges appellant's failure to keep adequate records as required by department regulations; his failure to develop a physical education program for all students; his consistent failure to organize and plan a program; his failure to keep classroom records; all of which, it is alleged, has been contrary to explicit instructions of his superior and in direct violation of the rules and regulations of the State Department of Education. The detailed specifications in support of these general charges are set forth in the remaining 34 allegations which refer to specific acts or incidents too numerous to summarize here.

On November 29, 1957, the appellant served an answer containing fifteen numbered paragraphs which, in substance, denied the charges and alleged that they were insufficient as a matter of law.

We have carefully reviewed the record on appeal, as stipulated by the parties, including the 45 exhibits and the testimony of the witnesses which takes up about 488 pages of the typewritten transcript.

We find that some of the charges are insufficient as a matter of law, unsubstantial, or not established by competent evidence. The basic charges are, nevertheless, supported by abundant evidence and we are of the unanimous opinion that the Board was fully justified in its decision that the teacher should be dismissed.

The charge that the teacher had not acquired tenure (Charge 31) was manifestly erroneous and insufficient on its fact as a matter of law. The continued employment of the teacher after the conclusion of his three year probationary term operated to give him tenure, as a matter of

law, despite the fact that the superintendent of schools failed to recommend him for tenure.

> Matter of Appeal of *Eulalie Mary Sanders*—(1951) 72 St. Dept. (Educ. 39.

Charges which we regard as unsubstantial or which were not established by competent evidence include those numbered 8, 9, 16, 18, 19, 21, 22 and 25. Although we feel that a few of the charges should have been dismissed by the Board and that some others were somewhat broader than the proof, the fact remains that most of the charges involved matters of substance and this record contains ample evidence to justify the Board in dismissing this teacher for insubordination, neglect of duty, failure to maintain required records, and conduct unbecoming a teacher. Indeed, several of the charges are substantiated in whole or in part by the appellant's own testimony.

The record as a whole discloses a continued refusal to follow orders and directives coupled with an attitude of long standing on the part of the appellant that was prejudicial to the orderly conduct of the school system. (*Matter of Catone* v. *Hopkins,* 6 A.D. (2d) 972).

The appellant's attorney argues that the decision of the Board is defective because it "does not constitute a finding of guilt" and also because it contains no formal "findings". It is true, as appellant's attorney points out, that findings have been required by the Courts on certain proceedings to review the determination of administrative or quasi-judicial agencies.

> *N. Y. Water Service Corp.* v. *Water Power & Control Com.,* 283 N.Y. 23, 29;
>
> *Matter of Guernsey Breeders Co-op.* v. *Noyes,* 284 N.Y. 197;

Appendix E

Matter of Elite Dairy Products, Inc. v. *Ten Eyck,* 271 N.Y. 488;

Matter of Barry v. *O'Connell,* 303 N.Y. 46;

Matter of Fink v. *Cole,* 1 N.Y. 2d 48.

Findings were required in *Matter of Wood* v. *Board of Education,* 267 A.D. 959. That case involved the dismissal of a teacher under Section 2573 of the Education Law where the statute (sd. 6) specifically authorizes review by a proceeding under C.P.A. Article 78. The time limitations in the statute under which this appeal is taken (Education Law, Sec. 3012) do not seem to contemplate formal findings by the Board. Sd. 3 of Section 3012 declares:

> "After each side has completed its case at the hearing, the board of education may by a majority vote dismiss said teacher from its service or may defer action regarding the decision for a period not to exceed five days."

Whether formal findings shall be required seems to depend, according to the reported decisions, on the nature of the issue to be reviewed. Findings are not mandatory in all courts or in all administrative agencies. (Powers of the New York Court of Appeals, by Cohen and Karger, Sec. 132, pg. 542). We know of no reported decisions which require findings on a review by an administrative agency such as the Tenure Commission, as distinguished from a review by the Court.

With the exceptions hereinafter noted, we know of no reported decisions which require formal findings in disciplinary or removal proceedings under Sec. 3012 of the Education Law or the comparable provisions in Section 22 of the Civil Service Law. The general rule in such cases is whether there is "substantial" evidence to support the determination under review.

Appendix E

Matter of Miller v. *Kling*, 291 N.Y. 65;

Matter of Leeman v. *O'Connell*, 281 A.D. 299, 300;

Matter of Harvey v. *Catherwood*, 268 A.D. 1016, aff'd 295 N.Y. 843.

Powers of the New York Court of Appeals by Cohan and Karger, Sec. 108, pg. 460.

The Appellate Division, Third Department, has recently held, however, that findings may be required when the issue under review is whether the appellant has suffered "an excessive penalty" (C.P.A. Sec. 1296, sd. 5-a enacted by Laws of 1955, ch. 661); Matter of Stotz v. Board of Regents, 4 A.D. 2d 361; Matter of Piper v. Lubin, 4 A.D. 2d 612. In both of these cases, the Court adopted the rule that "* * * we cannot insist upon a statement of reasons when there is no apparent disproportion between the nature of the offense and the extent of the punishment" (p. 365).

No such disproportion exists in the case now before us where the charges and the evidence in the record abundantly justified the penalty of dismissal. Under such circumstances, we do not believe that formal findings by the Board are essential to an adequate review of the issues.

We find no merit in the other objections in point of law raised by appellant's attorney. We feel that these objections are so lacking in substance that they do not require discussion other than to mention that the Commission has considered and rejected the appellant's contentions that (1) the charges are insufficient on their face as a matter of law; (2) that the Board had no jurisdiction to entertain the proceeding or to hold a hearing on such charges; (3) that the decision of the Board is jurisdictionally defective in form; (4) that the Board divested itself of jurisdiction by failing to render a proper decision within five days after the hearing (the decision was handed down two days

after the conclusion of the hearings); (5) that the Tenure Commission has jurisdiction to hear this appeal, but that there is nothing for the Tenure Commission to review.

We have entered into the foregoing discussion of the law because the statute (Education Law, Sec. 3012, sd. 3) requires the Tenure Commission to consider the appeal "both as to law and fact". Because a majority of the members of the Tenure Commission are not lawyers, we have discussed the law with reluctance, fortified, however, by the knowledge that under the statute our conclusions are expressed in the form of a "recommendation" to the Commissioner of Education whose decision alone shall be "final".

For the foregoing reasons, the members of the Commission participating in this decision unanimously recommend that the determination of the Board be affirmed.

s/ JOHN T. DEGRAFF

s/ AGDA S. OSBORN

s/ DOROTHY B. BUNNELL

s/ ALFRED T. PETERS

Hon. William T. Conklin took no part in the consideration or determination of this appeal.

APPENDIX F

Order of Appellate Division, Third Department, Denying Leave to Appeal to the Court of Appeals

(ORDER DENYING APPLICATION FOR LEAVE TO APPEAL)

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Courthouse in the City of Albany, New York, on the 12th day of August, 1968.

Present: HON. JAMES GIBSON,
Presiding Justice;

HON. J. CLARENCE HERLIHY,
HON. FELIX J. AULISI,
HON. ELLIS J. STALEY, JR.,
HON. DOMENICK L. GABRIELLI,
Associate Justices.

STATE OF NEW YORK

APPELLATE DIVISION, THIRD DEPARTMENT

In the Matter

—of—

the Application of PHILIP CHUFF, Petitioner, for an Order under Article 78 of the Civil Practice Act,

—against—

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 of the Towns of Frankfort and Schuyler, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,

Respondents.

Appendix F

A motion having been made by Stewart T. Schantz, Esq., at this term of court in the above-entitled proceeding for an order granting the petitioner leave to appeal to the Court of Appeals from the order of this court entered in the office of the Clerk of the Appellate Division, Third Judicial Department on June 21, 1968, and after reading and filing proof of due service of the notice of motion, the affidavit of Stewart T. Schantz, in support of the motion, the affidavit of Charles E. Crandall, Jr., Esq., and Elizabeth N. Eastman, Esq., in opposition thereto, and the Court having rendered a decision on the 5th day of September, 1968, it is hereby

ORDERED that the petitioner's application for permission to appeal to the Court of Appeals is denied without costs.

Enter:

s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: September 13, 1968

A True Copy:

s/ JOHN J. O'BRIEN
Clerk

APPENDIX G

Telegram Sent by Clerk of Court of Appeals as to Decision of Court of Appeals

(WESTERN UNION TELEGRAM)

SYA087

SY ABA 193 COLLECT—ALBANY NY 20 1128A EST—1968 Nov 20 PM

STEWART T SCHANTZ—

7 MILTON AVE. HIGHLAND NY=

MTR OF CHUFF & BD OF EDUC=MOTION FOR LEAVE TO APPEAL DENIED WITH TEN DOLLARS COSTS.=

RAYMOND J. CANNON
CLERK COURT OF APPEALS
ALBANY NY

APPENDIX H

Order of Court of Appeals Denying Leave to Appeal to Court of Appeals

STATE OF NEW YORK IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twentieth day of November, A.D., 1968.

Present: HON. STANLEY H. FULD,
Chief Judge, Presiding.

Mo. No. 1111

In the Matter

—of—

the Application of PHILIP CHUFF,

Appellant,

—v—

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 of the Towns of Frankfort and Schuyler, and John F. Murphy, Superintendent of Schools of said Central School District, and James E. Allen, Jr., Commissioner of Education of the State of New York,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had;

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs.

A copy.

s/ GEARON KIMBALL
Deputy Clerk

SUPREME COURT, U. S.

MAR 3 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 1058

PHILIP CHUFF,

Petitioner,

against

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

JOHN P. JEHU
Associate Counsel
State Education Department
State Education Building
Albany, New York 12224
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ROBERT D. STONE
Counsel and Deputy Commissioner
of Education for Legal Affairs
State Education Department
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Albany, New York 12224

ELIZABETH M. EASTMAN
DONALD O. MESERVE
KENNETH J. TOOMEY
of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

	PAGE
Opinions and Orders Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	5
Argument	7
Conclusion	9

STATUTES CITED.

New York Education Law:	
Subdivision 2	3, 7
Subdivision 3	3, 6, 8
Subdivision 4	3
U. S. Constitution:	
First Amendment	2, 9
Fourteenth Amendment	2
28 U. S. C. Section 1257 (3)	2, 5

INDEX TO APPENDIX.

		PAGE
A.	Order of Court of Appeals Denying Leave to Appeal to Court of Appeals	11
B.	Order of Appellate Division, Third Department, Denying Leave to Appeal to the Court of Appeals	12
C.	Order of Appellate Division, Third Department, Dismissing Petition	14
D.	Opinion of Appellate Division, Third Department in Dismissing Petition	16
E.	Order of Supreme Court, Albany County, Transferring Case to Appellate Division	17
F.	Opinion of Supreme Court, Albany County	19
G.	Decision of Commissioner of Education	25
H.	Opinion of Tenure Commission	27
I.	Decision of Board of Education	35
J.	Notice of Hearing	37
K.	Charges	39

IN THE

Supreme Court of the United States

October Term, 1968

No. .....

PHILIP CHUFF,

Petitioner,

against

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

Respondent James E. Allen, Jr., as Commissioner of Education of the State of New York, respectfully prays that the petition herein for writ of certiorari to the State of New York Supreme Court, Appellate Division, Third Judicial Department be denied.

Opinions and Orders Below

The orders of the State of New York Court of Appeals and the State of New York Supreme Court, Appellate

Division, Third Judicial Department denying leave to appeal to the Court of Appeals are appended hereto. The opinions below, both of the court in which this proceeding was originally brought and the Appellate Division, are reported at 20 Misc. 2d 1067, 190 N. Y. S. 2d 214, and 30 A. D. 2d 590, 290 N. Y. S. 2d 936, respectively are also appended hereto, as are the decisions of the Tenure Commission of the State of New York and of the Commissioner of Education.

Jurisdiction

The asserted basis of jurisdiction is alleged deprivations of petitioner's right of free speech under the First Amendment to the United States Constitution and of his right to due process of law under the Fourteenth Amendment to the United States Constitution. Statutory provision allegedly conferring jurisdiction on this court to review the order in question is 28 U. S. C. sec. 1257 (3).

Questions Presented for Review

1. Has petitioner's right of free speech been infringed upon by his having been dismissed from his teaching position upon charges having substantial basis?

2. Did the procedures employed by respondent deny petitioner's right of due process of law?

Constitutional Provisions and Statutes Involved

Amendment I, United States Constitution:

> "Congress shall make no law * * * abridging the freedom of speech * * *."

Amendment XIV, United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Education Law, Section 3012, Subdivision 2, New York Laws 1947, Chapter 820, as amended by New York Laws 1952, Chapter 407, Section 1:

"* * * all others employed in the teaching, examining or supervising service of the schools * * * shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes: (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty. * * *"

Education Law, Section 3012, Subdivisions 3 and 4, New York Laws 1947, Chapter 820:

"All charges against a person enjoying the benefits of tenure as provided in this section shall be made to the board of education by the superintendent of schools or by charges in writing filed with the clerk of the board of education. No teacher on tenure shall be dismissed, however, unless furnished with a written statement, specifying in detail the charge or charges against said teacher, signed by the proper officer of the board of education and naming a date and place at which the teacher may appear before the board of education and answer said charge or charges. Provided, nevertheless, that the opportunity for the hearing shall not be less than twenty nor more than thirty days after the service of such charges upon the teacher or the mailing of such charges to him by United States registered mail with postage prepaid thereon, to his last known address. Said charges are to be preferred only during the interim between the actual opening and closing of the school year for which the teacher is employed. Nothing herein provided is intended to prevent the suspension of a teacher pending

a hearing on such charges and the final determination thereof. No teacher dismissed as a result of such charges shall receive compensation for the period of such suspension. If a reply to said charges is not made in the allotted time, then the board of education may dismiss the teacher by a majority vote and such dismissal shall be final. If the teacher desires to make an answer to the charges, it shall be the duty of the board of education to issue such subpoenas under its seal and the signature of the proper officer as shall be necessary for the determination of the issues involved. At the time and place set the issues shall be heard. Each witness shall be required to take oath or affirmation before an officer of the board of education. At such hearing, which shall be private or public at the discretion of the teacher, each party shall have the privilege of being represented by counsel. It shall be the duty of said board of education to employ a competent stenographer to keep and transcribe a record of the proceedings at such hearing. After each side has completed its case at the hearing, the board of education may by a majority vote dismiss said teacher from its service, or may defer action regarding the decision for a period not to exceed five days. Provided, however, the teacher shall have a right to make an appeal both as to law and fact to the tenure commission as hereinafter described. If said appeal is not made in ten days after dismissal, the decision of the board of education shall be final. In said appeal the teacher shall submit the case on the evidence as recorded in the hearing before the board of education. The tenure commission shall proceed in the same manner as the board of education, setting the date of said hearing not less than ten nor more than thirty days after notice of such an appeal shall have been received. The tenure commission shall by a majority vote make its recommendation to the commissioner of education. The decision of the commissioner of education shall be final.

The tenure commission shall consist of five members. Two members shall be appointed by the governor, one by the commissioner of education, one by the executive

committee of the New York state teachers association, from among its membership employed in a union free school district having a population of more than forty-five hundred inhabitants and employing a superintendent of schools, and one by the executive committee of the New York state school boards association, from among its membership representing a union free school district having a population of more than forty-five hundred inhabitants and employing a superintendent of schools. All members of the tenure commission shall serve for a period of five years. Any vacancy shall be filled for the unexpired term in the same manner as the original appointment. Each member of the tenure commission shall receive twenty dollars per day for each day's service and his necessary traveling expenses incurred in the discharge of his duties, and the finance division of the New York state education department shall audit and allow the same in accordance with established practice."

28 U. S. Code, Section 1257 (3):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (3) by writ of certiorari, where the validity of treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Statement of the Case

Petitioner was employed by the respondent Board of Education as a physical education teacher from September 1, 1946 until December 21, 1957 and thus had tenure. A hearing was held by the Board of Education during 7 days between December 9, 1957 and December 19, 1957

upon 31 charges made by the respondent Superintendent of Schools against petitioner and which had been duly served upon petitioner. The Board unanimously sustained the charges as being supported by credible evidence and dismissed petitioner on December 21, 1957. Thereafter petitioner appealed to the Tenure Commission as then provided in Section 3012, subdivision 3 of the Education Law. The Tenure Commission held a hearing on June 30, 1958 at which petitioner was represented by counsel. The Commission, while dismissing 9 of the 31 charges against the petitioner as being unsubstantiated by the evidence or erroneous, found that the record before the Board of Education contained substantial evidence to support the Board's decision and unanimously affirmed that decision. Respondent Commissioner of Education reviewed and affirmed the decision of the Tenure Commission.

This proceeding was commenced in the Supreme Court of New York, Albany County. That Court, finding the issue to be whether the Commissioner's decision was supported by substantial evidence, transferred the proceeding to the Appellate Division by Order dated January 4, 1960. Petitioner then waited approximately 8 years before filing said Order with the Appellate Division on December 19, 1967. The Appellate Division, finding that the record contained substantial evidence warranting the decision, affirmed the Commissioner's decision on May 20, 1968. An order to that effect was entered on June 21, 1968. Appellate Division denied, without opinion, petitioner's motion for leave to appeal to the New York Court of Appeals on September 5, 1968. The Court of Appeals denied petitioner's motion for leave to appeal to said Court on November 20, 1968.

ARGUMENT

There is no substantial Federal question.

Petitioner's argument that his constitutional right to due process was violated by the failure of the Board of Education to make findings of fact, by the lack of substantial evidence and by "unusual" procedures is sham, frivolous and entirely without merit and is contradicted by the extensive evidence in the record. The decision of the Board of Education indicates that petitioner was found guilty of all the charges specifically set forth against him. The format of the charges themselves was such that, though there were 31 numbered Charges, Charges 1 and 2 were the basic charges supported by the specifications in the remaining 29 charges. In effect, therefore, the decision of the Board of Education that petitioner was guilty of all the charges indicated that the "facts" in Charges 3-29 were substantiated by credible evidence at the hearing and were sufficient to support the basic charges of inefficiency, incompetency, neglect of duty, insubordination, conduct unbecoming a teacher and failure to keep records, several of which are specific grounds for removal of a teacher set forth in subdivision 2 of Section 3012 of the Education Law. The Tenure Commission, to which petitioner appealed the Board's decision, eliminated 8 of the charges for insufficiency of evidence or insubstantiality and another of the charges as being erroneous. That Commission found that the basic charges were, despite the elimination of 9 specific charges, supported by substantial evidence in the remaining charges and in the record. The Appellate Court also found that the dismissal of petitioner was supported by "substantial evidence". If on the other hand, it is assumed for the sake of argument that peti-

tioner's allegation as to the absence of findings is true, this would not be sufficient to warrant the reversal of the Appellate Division's Order dismissing his petition. The cases cited by petitioner as requiring findings of fact as a matter of fairness and due process are not applicable to the instant case. Those were cases in which the decision was either limited to the particular case or the measure of discipline was too harsh for the misconduct involved. This is not the case herein. However, it is submitted that there were findings of fact to support the dismissal of petitioner.

Petitioner's allegations that the "unusual" procedure infringed upon his right of due process is totally unwarranted. The notice of hearing and petition, the actual hearing before the Board of Education, at which petitioner was present in person and by counsel and was given an opportunity to examine the witnesses, the hearing and review by the Tenure Commission as provided in Section 3012, subdivision 3 of the Education Law, and the review by the Commissioner of Education insured petitioner's right of due process rather than infringed upon it. Petitioner's allegations on this point are bare conclusions and are totally unsupported by the record. The credibility of the witnesses who appeared at the hearing of the Board of Education has been passed upon by that hearing tribunal, which was in the best position to pass upon the credibility of the evidence, and inferentially by the Tenure Commission, the Commissioner of Education, and the Appellate Division in its review of this matter on the merits.

Petitioner alleges a deprivation of his right of free speech in that he was dismissed for criticizing the Board of Education. This allegation is without basis. Petitioner cites Charges 20-25 by supporting this allegation. Of these,

Charges 21, 22 and 25 were dismissed upon the review by the Tenure Commission and were not, therefore, the basis for petitioner's dismissal. The other 3 charges referred to support the basic charge of insubordination found in Charge 1. In Charge 20 petitioner stated that he would fight his superior every step of the way. Under Charge 23 petitioner was found guilty of using abusive and uncontrolled language and under Charge 24 it appears that he left school without permission and resigned his position as football coach a few days before the football season began without giving the required notification thereof. Even if we were to assume arguendo that petitioner is correct in his argument as to these 3 charges, it is clear that his dismissal is amply justified on the basis of the remaining 19 charges of which he had been found guilty. We do not, however, admit that his constitutional rights were violated. These 3 charges support the basic charges of insubordination and conduct unbecoming a teacher and do not conflict with the First Amendment to the United States Constitution. *Pickering* v. *Board of Education,* 20 L. Ed. 2d 811, cited by petitioner in support of this allegation, is clearly not in point. In its discussion in that case this Court made it clear that the dispute between the teacher and his superiors could not be characterized as insubordination or such that could affect the performance of his duties. Petitioner's dispute with and criticism of his superiors blatantly demonstrate his insubordination and did affect the performance of duties.

CONCLUSION

The record indicates that petitioner was not deprived of his right of free speech. The procedures employed by respondents were totally constitutional, prescribed by statute and insured rather than infringed upon petitioner's

right to due process. Though findings of fact are not necessary in administrative proceedings of this nature there were, nevertheless, ample findings of fact to support the basic charges against petitioner.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN P. JEHU
Associate Counsel
State Education Department
State Education Building
Albany, New York 12224
Attorney for Respondents

ROBERT D. STONE
Counsel and Deputy Commissioner
of Education for Legal Affairs
State Education Department
State Education Building
Albany, New York 12224

ELIZABETH M. EASTMAN
DONALD O. MESERVE
KENNETH J. TOOMEY
of Counsel

APPENDIX A

Order of Court of Appeals Denying Leave to Appeal to Court of Appeals

STATE OF NEW YORK IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twentieth day of November, A. D., 1968.

Present: Hon. Stanley H. Fuld,

Chief Judge, Presiding.

Mo. No. 1111

In the Matter of the Application
of
PHILIP CHUFF,

Appellant,

v.

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had;

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs.

A copy.

s/ GEARON KIMBALL
Deputy Clerk

APPENDIX B

Order of Appellate Division, Third Department, Denying Leave to Appeal to the Court of Appeals

(Order Denying Application for Leave to Appeal)

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Courthouse in the City of Albany, New York, on the 12th day of August, 1968.

Present: Hon. James Gibson,

Presiding Justice;

Hon. J. Clarence Herlihy,
Hon. Felix J. Aulisi,
Hon. Ellis J. Staley, Jr.,
Hon. Domenick L. Gabrielli,

Associate Justices.

STATE OF NEW YORK

Appellate Division—Third Department

In the Matter of the Application
of
PHILIP CHUFF,

Petitioner,

For an Order under Article 78 of the Civil Practice Act,

against

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,

Respondents.

A motion having been made by Stewart T. Schantz, Esq., at this term of court in the above-entitled proceeding for an order granting the petitioner leave to appeal to the Court of Appeals from the order of this court entered in the office of the Clerk of the Appellate Division, Third Judicial Department on June 21, 1968, and after reading and filing proof of due service of the notice of motion, the affidavit of Stewart T. Schantz, in support of the motion, the affidavit of Charles E. Crandall, Jr., Esq., and Elizabeth N. Eastman, Esq., in opposition thereto, and the Court having rendered a decision on the 5th day of September, 1968, it is hereby

ORDERED that the petitioner's application for permission to appeal to the Court of Appeals is denied without costs.

Enter:

s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: September 13, 1968.

A True Copy:
s/ JOHN J. O'BRIEN
Clerk

APPENDIX C

Order of Appellate Division, Third Department, Dismissing Petition (Order Appealed From)

(Order of Affirmance)

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Courthouse in the City of Albany, New York, commencing on the 22nd day of April, 1968.

Present: Hon. James Gibson,

Presiding Justice.

Hon. J. Clarence Herlihy,
Hon. Felix J. Staley, Jr.,
Hon. Domenick L. Gabrielli,

Associate Justices.

In the Matter of the Application
of
PHILIP CHUFF,

Petitioner,

For an Order under Article 78 of the Civil Practice Act,

against

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,

Respondents.

The above-entitled proceeding under Article 78 of the CPLR (transferred to this Court by order of the Supreme Court at Special Term Albany County) to review a determination of the Commissioner of Education dated February

4th, 1959, which affirmed the determinations of the State Tenure Commission and the Board of Education of Central School District #2 of the Towns of Frankfort and Schuyler, removing Petitioner from his position as a school teacher, and said proceeding having been argued by Lewis C. DiStasi, Jr., Esq. of counsel for the Petitioner-Appellant and by John P. Jehu, Esq., of counsel for the Respondent, Commissioner of Education, and by Charles E. Crandall, Jr., Esq. of counsel, for the respondent, Board of Education, Central School District #2 of the Towns of Frankfort and Schuyler and John F. Murphy, Superintendent, and after due deliberation of the Court having rendered a decision on the 20th day of May, 1968, it is hereby

ORDERED that the aforesaid determination of the Commissioner of Education be and the same hereby is confirmed, without costs, and the petition be and the same hereby is dismissed.

Enter:

s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: June 21, 1968.

A True Copy:
s/ JOHN J. O'BRIEN
Clerk

APPENDIX D

Opinion of Appellate Division, Third Department in Dismissing Petition

(MEMORANDUM BY THE COURT)

May 20, 1968. 12309

In the Matter
of
PHILIP CHUFF,

Petitioner,

v.

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF TH ' TOWNS OF FRANKFORT AND SCHUYLER, *et al.*,

Respondents.

Article 78 proceeding transferred to this court by order of Special Term.

The Petitioner was removed from his position as a school teacher in the respondent Board of Education's school system in 1957 pursuant to section 3012 of the Education Law. The proceeding was reviewed by the Tenure Commission and it recommended to the Commissioner of Education that the removal be upheld. In 1959 the Commissioner duly found that the removal was proper. In 1960 the petitioner obtained the order transferring the proceeding to this court, but did not enter the order until December of 1967.

We find that the record as a whole contained substantial evidence which cumulatively warranted the dismissal of the petitioner and that the action of the Commissioner was not arbitrary and/or capricious.

Determination confirmed, without costs, and petition dismissed.

GIBSON, P. J., HERLIHY, AULISI, STALEY, JR. and GABRIELLI, JJ., concur in memorandum by the court.

APPENDIX E

Order of Supreme Court, Albany County, Transferring Case to Appellate Division

At a Special Term of the Supreme Court held in and for the County of Albany at the Court House in the City of Albany, on the 29th day of June, 1959.

Present: Hon. Herbert D. Hamm,
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

In the Matter of the Application
of
PHILIP CHUFF,
Petitioner,

For an Order under Article 78 of the Civil Practice Act,

against

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,
Respondents.

The above named petitioner having applied to this Court for an Order pursuant to Article 78 of the Civil Practice

Act to review the determination made by the respondents, dismissing the petitioner from this employment as a teacher in the schools of the respondent Board of Education, which determination was made after a hearing held, at which evidence was taken, pursuant to statutory direction, and seeking the reinstatement of the petitioner to his employment as a teacher in the public schools of the respondent school district, and said application having duly come on to be heard before this Court on the 29th day of June, 1959.

Now on reading and filing the notice of motion herein, and the verified petition of Philip Chuff, and the answer of the respondent Board of Education of Central School District #2 of the Towns of Frankfort and Schuyler and John F. Murphy, Superintendent of Schools, and the answer of the respondent James E. Allen, Jr., as Commissioner of Education of the State of New York, and the reply of the petitioner Philip Chuff, and the affidavits and exhibits annexed to such papers, and after hearing Fred J. O'Donnell, attorney for the petitioner in support of said application, and Charles A. Brind, attorney for the respondent Commissioner of Education by John P. Jehu of counsel, and Albert L. Lawrence, Attorney for the Board of Education of Central School District #2, Towns of Frankfort and Schuyler, Herkimer County, and John F. Murphy, by Daniel J. Blaugrund of counsel, in opposition to said application, and due deliberation having been had thereon, it is

ORDERED, that this proceeding be, and the same hereby is transferred for disposition, to a Term of the Appellate Division of this Court for the Third Judicial Department pursuant to the provisions of the Civil Practice Act.

s/ HERBERT D. HAMM
Justice of the Supreme Court

Dated: Troy, New York, January 4, 1960.

APPENDIX F

Opinion of Supreme Court, Albany County

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ALBANY

In the Matter of the Application
of
PHILIP CHUFF,

Petitioner,

For an Order under Article 78 of the Civil Practice Act,

against

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, JR., Commissioner of Education of the State of New York,

Respondents.

(Supreme Court, Albany County Special Term,
June 29, 1960)

(Justice HERBERT D. HAMM, Presiding)

Appearances:

Fred J. O'Donnell, Esq., Attorney for Petitioner.

Charles A. Brind, Esq. (John P. Jehu, Esq., of counsel), Attorney for Respondent, Commissioner of Education.

Albert L. Lawrence, Esq. (Daniel J. Blaugrund, Esq., of counsel), Attorney for Respondents, Board of Education of Central School District No. 2, Towns of Frankfort and Schuyler, Herkimer County, and John F. Murphy.

MEMORANDUM

HAMM, J.

The petitioner is a teacher. By a written statement dated November 7, 1957, the Superintendent of Schools initiated a disciplinary proceeding against him. The written statement comprised thirty-six separately numbered allegationes characterized as "charges". After hearings conducted on several days the Board of Education stated in writing: "* * * it is the unanimous decision of the members of the Board of Education hearing this matter that the credible evidence sustains the charges and that said Philip Chuff * * * be dismissed as a teacher in said school district". No findings of fact were made which would show the particular matter determined against the petitioner herein.

Subdivision 3 of Section 3012 of the Education Law as pertinent provides:

> "* * * At the time and place set the issues shall be heard. Each witness shall be required to take oath or affirmation before an officer of the Board of Education. At such hearing, which shall be private or public at the discretion of the teacher, each party shall have the privilege of being represented by counsel. It shall be the duty of said board of education to employ a competent stenographer to keep and transcribe a record of the proceedings at such hearing. After each side has completed its case at the hearing, the board of education may by a majority vote dismiss said teacher from its service, or may defer action regarding the decision for a period not to exceed five days. Provided, however, the teacher shall have a right to make an appeal both as to law and fact to the tenure commission as hereinafter described. If said appeal is not made in ten days after dismissal, the decision of the board of education shall be final. In said appeal the teacher shall submit the case on the evidence as recorded in the hearing before the board of education.

> The tenure commission shall proceed in the same manner as the board of education, setting the date of said hearing not less than ten or more than thirty days after notice of such an appeal shall have been received. The tenure commission shall by a majority vote make its recommendation to the commissioner of education. The decision of the Commissioner of Education shall be final."

An appeal was made to the Tenure Commission. The Tenure Commission stated that it regarded eight of the charges as unsubstantial or as not established by competent evidence and that another charge that the petitioner had not acquired tenure was "manifestly erroneous and insufficient on its face as a matter of law". For its recommendation the Tenure Commission concluded "* * * the members of the Commission participating in this decision unanimously recommend that the determination of the Board be affirmed." The Commissioner said: "Upon an examination of the record in this proceeding, it appears that there is no basis for substitution of my judgment for that of the Board of Education and the Tenure Commission. It is ORDERED that the recommendation of the Tenure Commission be affirmed."

Section 3012 states that the "decision of the commissioner of education shall be final." It does not require, as does Section 310 of the Education Law, that the Commissioner's decision shall be "not subject to question or review in any place or court whatever", nor does it state, as does Section 2037, that the Commissioner's decisions shall be "not subject to review." Although it has been held that Section 310 does not prevent judicial review to the extent of determining whether the Commissioner was purely arbitrary (*Mtr. of Bd. of Educ. of City of N. Y.* v. *Allen*, 6 N. Y. 2d 127), some doubt has beeen expressed as to whether Section 2037 permits review to the extent that review may

be had in a case arising under Section 310 (*Matter of Colson* v. *Allen,* 285 App. Div. 797, 798; *Matter of Kuhn* v. *Comr. of Educ.,* 1 A. D. 2d 533, 537, appeal dismissed 2 N. Y. 2d 749). In *Matter of Eaton* v. *Allen,* 1 Misc. 2d 496, the determination of the Commissioner after an appeal under Section 2037 was annulled but the annulment was based on interpretation of an underlying statute (*Cf. Matter of Ross* v. *Wilson,* 308 N. Y. 605). In *Matter of O'Brien* v. *Comr. of Educ.,* 3 A. D. 2d 321, appeal dismissed 4 N. Y. 2d 140, motion for reargument denied 6 N. Y. 2d 882, the proof failed to demonstrate that the Commissioner's decision was arbitrary and consequently the question was not reached. In the absence of any restrictive language in Subdivision 3 of Section 3012 qualifying the finality of the Commissioner's decision, the issue is whether the Commissioner's decision was supported by substantial evidence.

It seems clear that this Article 78 proceeding to review the Commissioner's decision should be regarded as one in the nature of certiorari, rather than mandamus (*Mtr. of Irving* v. *Finger Lakes, Comm.,* 12 Misc. 2d 1087, 1088-1089). This is a proceeding to scrutinize the judicial determination of the Commissioner after his judicial examination of evidence as the result of a hearing held, at which evidence was taken pursuant to statutory requirement after an opportunity to be heard and to present evidence had been afforded. Issues as to whether the charges were supported by substantial evidence are raised under Subdivisions 6 and 7 of Section 1296 of the Civil Practice Act and transfer to the Appellate Division is indicated.

The Commissioner urges the petitioner's appeal to him was not only under Section 3012 but also under Section 310 of the Education Law and that the only issue is whether the Commissioner was arbitrary. If this were so, the issue

would be not whether the charges were supported by substantial evidence, but whether a reasonable man could find that they were supported by substantial evidence. It is indisputable that the appeal under consideration was taken under and pursuant to Section 3012. The caution exercised in limiting review of the Commissioner's decisions when they are by statute "not subject to question or review in any place or court whatever" is not required when there is no such statutory limitation. In fact, the deliberate omission of statutory restriction of the right to review so manifests.

The petitioner, stating that this proceeding should be transferred urges that there is a preliminary question of law to be determined by Special Term. He says that the Board's conclusory determination that the credible evidence sustained the charges was insufficient as a matter of law and that he was entitled to findings which would show more precisely what was determined against him. Findings, however, are not mandatory in all situations. It has been said (*Matter of McCall Corp.* v. *Gerosa,* 2 A. D. 2d 358, 361): "The court should not be required to speculate as to the reason for the administrative ruling (See *Securities Comm.* v. *Chenery Corp.,* 332 U. S. 194; *Matter of Barry* v. *O'Connell,* 303 N. Y. 46)." On the other hand in *Matter of Stolz* v. *Board of Regents,* 4 A. D. 2d 361, the determination was confirmed and it was said at page 365: "It is true that a statement of reasons would be helpful to the court in any case, in the exercise of its newly granted power to review or measure of punishment, but we cannot insist upon a statement of reasons when there is no apparent disproportion between the nature of the offense and the extent of the punishment. It may fairly be assumed, without any explicit statement to that effect, that the board selected the

particular measure of discipline because it believed it to be appropriate to the nature of the offense." In *Matter of Piper* v. *Lubin,* 4 A. D. 2d 812, 813, wherein the absence of findings required annulment and remission, the Court stated: "Here, some factual evaluation was required. The matter of punishment to be passed upon by us, pursuant to the authority lately conferred (Civ. Prac. Act § 1296, subd. 5-a) cannot be reviewed without at least an expression of conclusions and reasons and a record of factual content sufficient to support them, since the inherent nature of the offenses does not necessarily demand such stringent punishment (See *Matter of Stolz* v. *Board of Regents,* 4 A. D. 2d 361)."

In this case it will be for the Appellate Division to decide whether the record is such as to be reviewable without the findings which the petitioner contends should have been made.

Submit order of transfer in accordance herewith. The pleadings, affidavits and exhibits will be forwarded with the signed order.

Dated at Troy, New York, August 19th, 1959.

APPENDIX G

Decision of Commissioner of Education

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE DEPARTMENT OF EDUCATION

BEFORE THE COMMISSIONER

In the Matter of the Appeal
of
PHILIP CHUFF from the action of the Board of Education of Central School District No. 2 of the Towns of Frankfort and Schuyler, Herkimer County, in dismissing him as a teacher.

Fred J. O'Donnell, Esq., Attorney for Appellant.

Albert L. Lawrence, Esq., Attorney for Respondent. Daniel J. Blaugrund, Esq., of Counsel.

John E. Glenn, Esq., *Amicus Curiae,* New York State Teachers Association.

Appellant was dismissed as a teacher in the above-named school district after charges had been preferred against him and a hearing held by the Board of Education pursuant to Section 3012 of the Education Law. The appeal from the action of the Board of Education in dismissing him has been heard and reviewed by the State Tenure Commission, and the said Commissioner's recommendation to affirm the Board's determination in this matter has been transmitted to me.

Upon an examination of the record in this proceeding, it appears that there is no basis for substitution of my

judgment for that of the Board of Education and the Tenure Commission.

IT IS ORDERED that the recommendation of the Tenure Commission be affirmed.

IN WITNESS WHEREOF, I, James E. Allen, Jr., Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 4th day of February, 1959.

JAMES E. ALLEN, JR.
Commissioner of Education

(SEAL)

APPENDIX H

Opinion of Tenure Commission

STATE TENURE COMMISSION

In the Matter of the Removal
of
PHILIP CHUFF,

As a Teacher in Central School District #2 of the Towns of Frankfort and Schuyler.

Argued June 30, 1958.

Commissioners:

John T. De Graff, *Chairman,*
Mrs. Robert Curtis Osborn,
Mrs. Homer Bunnell,
William T. Conklin,
Alfred T. Peters.

Appearances:

Fred J. O'Donnell, Attorney for Appellant.

Albert L. Lawrence, Attorney for School District, Daniel J. Blaugrund, of Counsel.

RECOMMENDATION

This is an appeal, pursuant to Section 3012 of the Education Law, from a determination of the Board of Education of Central School District #2 of the Towns of Frankfort and Schuyler, dismissing the appellant, Philip Chuff, as a teacher in said School District. The unanimous determination of the five members of the Board who conducted the hearing, was made on December 31, 1957, following

hearings held on December 9, 10, 11, 16, 17, 18 and 19, 1957. The notice of appeal, dated December 28, 1957, was received by the Tenure Commission on or about January 4, 1958.

The Tenure Commission was notified in a letter from the attorney for the petitioner, dated January 15, 1958, that the preparation of the transcript of the testimony taken before the Board would be delayed and that the Tenure Commission would be informed of the date of completion of the record so that a hearing could then be scheduled. The Commission was subsequently informed, by letter dated June 5, 1958, that the record had been completed and that the parties were ready to proceed with the hearing.

The hearing was held in Albany on June 30, 1958 and the issues were argued by Fred J. O'Connell, Esq., 53 West Street, Ilion, New York, on behalf of appellant, and by Daniel J. Blaugrund, Esq., 273 West Main Street, Herkimer, New York on behalf of respondent.

Before the hearing, the attorneys for the respective parties stipulated as follows:

1. That the provisions of Section 3012 of the Education Law, which require that the hearing before the Tenure Commission shall be held "not less than ten nor more than thirty days after notice of such an appeal has been received" are waived by the respective parties and the parties consent that the hearing be held on June 30, 1958.

2. That the issues may be submitted to and determined by the full membership of the Tenure Commission, despite the inability of two members to attend the hearing, on the basis of the record filed with the Tenure Commission as hereinafter set forth in paragraph 4.

3. That any time limitations that might exist in relation to the filing of the determination of the Tenure Commission are waived by the parties who expressly agree that the Tenure Commission may have such time as may be necessary for the filing of its recommendations with the Commissioner of Education.

4. That the issues are to be submitted to and determined by the Tenure Commission on the following record as submitted by the respective parties:

a. Notice of Appeal;

b. Charges;

c. Notice of suspension;

d. Answer;

e. Decision;

f. Transcript of testimony before the school board;

g. Plaintiff's exhibits numbered 1 to 23 inclusive;

h. Defendant's exhibits numbered A to V inclusive (Defendant's Exhibit W could not be found by either of the parties to the appeal).

The proceeding which is the subject of this appeal was initiated by charges dated November 7, 1957, made by John F. Murphy, Superintendent of Schools of Central School District No. 2. They comprise thirty-six separate numbered allegations characterized as "charges". Charges 1 and 2 are general in nature. The others are specific and could more properly be termed specifications in support of the general allegations contained in the first two charges.

The first charge alleges that appellant was guilty of inefficiency, incompetency, neglect of duties, insubordination, and conduct unbecoming a teacher.

The second charge alleges appellant's failure to keep adequate records as required by department regulations; his failure to develop a physical education program for all students; his consistent failure to organize and plan a program; his failure to keep classroom records; all of which, it is alleged, has been contrary to explicit instructions of his superior and in direct violation of the rules and regulations of the State Department of Education. The detailed specifications in support of these general charges are set forth in the remaining 34 allegations which refer to specific acts or incidents too numerous to summarize here.

On November 29, 1957, the appellant served an answer containing fifteen numbered paragraphs which, in substance, denied the charges and alleged that they were insufficient as a matter of law.

We have carefully reviewed the record on appeal, as stipulated by the parties, including the 45 exhibits and the testimony of the witnesses which takes up about 488 pages of the typewritten transcript.

We find that some of the charges are insufficient as a matter of law, unsubstantial, or not established by competent evidence. The basic charges are, nevertheless, supported by abundant evidence and we are of the unanimous opinion that the Board was fully justified in its decision that the teacher should be dismissed.

The charge that the teacher had not acquired tenure (Charge 31) was manifestly erroneous and insufficient on its fact as a matter of law. The continued employment of the teacher after the conclusion of his three years probationary term operated to give him tenure, as a matter of law, despite the fact that the superintendent of schools failed to recommend him for tenure.

Matter of Appeal of Eulalie Mary Sanders—(1951) 72 St. Dept. (Educ. 39).

Charges which we regard as unsubstantial or which were not established by competent evidence include those numbered 8, 9, 16, 18, 19, 21, 22 and 25. Although we feel that a few of the charges should have been dismissed by the Board and that some others were somewhat broader than the proof, the fact remains that most of the charges involved matters of substance and this record contains ample evidence to justify the Board in dismissing this teacher for insubordination, neglect of duty, failure to maintain required records, and conduct unbecoming a teacher. Indeed, several of the charges are substantiated in whole or in part by the appellant's own testimony.

The record as a whole discloses a continued refusal to follow orders and directives coupled with an attitude of long standing on the part of the appellant that was prejudicial to the orderly conduct of the school system (*Matter of Catone* v. *Hopkins,* 6 A. D. [2d] 972).

The appellant's attorney argues that the decision of the Board is defective because it "does not constitute a finding of guilt" and also because it contains no formal "findings". It is true, as appellant's attorney points out, that findings have been required by the Courts on certain proceedings to review the determination of administrative or quasi-judicial agencies.

N. Y. Water Service Corp. v. *Water Power & Control Com.,* 283 N. Y. 23, 29;
Matter of Guernsey Breeders Co-op. v. *Noyes,* 284 N. Y. 197;
Matter of Elite Dairy Produces, Inc. v. *Ten Eyck,* 271 N. Y. 488;
Matter of Barry v. *O'Connell,* 303 N. Y. 46;
Matter of Fink v. *Cole,* 1 N. Y. 2d 48.

Findings were required in *Matter of Wood* v. *Board of Education,* 267 A. D. 959. That case involved the dismissal of a teacher under Section 2573 of the Education Law where the statute (sd. 6) specifically authorizes review by a proceeding under C. P. A. Article 78. The time limitations in the statute under which this appeal is taken (Education Law, Sec. 3012) do not seem to contemplate formal findings by the Board. Sd. 3 of Section 3012 declares:

> "After each side has completed its case at the hearing, the board of education may by a majority vote dismiss said teacher from its service or may defer action regarding the decision for a period not to exceed five days."

Whether formal findings shall be required seems to depend, according to the reported decisions, on the nature of the issue to be reviewed. Findings are not mandatory in all courts or in all administrative agencies. (Powers of the New York Court of Appeals, by Cohen and Karger, Sec. 132, pg. 542). We know of no reported decisions which require findings on a review by an administrative agency such as the Tenure Commission, as distinguished from a review by the Court.

With the exceptions hereinafter noted, we know of no reported decisions which require formal findings in disciplinary or removal proceedings under Sec. 3012 of the Education Law or the comparable provisions in Section 22 of the Civil Service Law. The general rule in such cases is whether there is "substantial" evidence to support the determination under review.

Matter of Miller v. *Kling,* 291 N. Y. 65;
Matter of Leeman v. *O'Connell,* 281 A. D. 299, 300;
Matter of Harvey v. *Catherwood,* 268 A. D. 1016, aff'd 295 N. Y. 843.
Powers of the New York Court of Appeals by Cohan and Karger, Sec. 108, pg. 460.

The Appellate Division, Third Department, has recently held, however, that findings may be required when the issue under review is whether the appellant has suffered "an excessive penalty" (C. P. A. Sec. 1296, sd. 5-a enacted by Laws of 1955, ch. 661); *Matter of Stotz* v. *Board of Regents*, 4. A. D. 2d 361; *Matter of Piper* v. *Lubin*, 4 A. D. 2d 612. In both of these cases, the Court adopted the rule that "* * * we cannot insist upon a statement of reasons when there is not apparent disproportion between the nature of the offense and the extent of the punishment" (p. 365).

No such disproportion exists in the case now before us where the charges and the evidence in the record abundantly justified the penalty of dismissal. Under such circumstances, we do not believe that formal findings by the Board are essential to an adequate review of the issues.

We find no merit in the other objections in point of law raised by appellant's attorney. We feel that these objections are so lacking in substance that they do not require discussion other than to mention that the Commission has considered and rejected the appellant's contentions that (1) the charges are insufficient on their face as a matter of law; (2) that the Board had no jurisdiction to entertain the proceeding or to hold a hearing on such charges; (3) that the decision of the Board is jurisdictionally defective in form; (4) that the Board divested itself of jurisdiction by failing to render a proper decision within five days after the hearing (the decision was handed down two days after the conclusion of the hearings); (5) that the Tenure Commission has jurisdiction to hear this appeal, but that there is nothing for the Tenure Commission to review.

We have entered into the foregoing discussion of the law because the statute (Education Law, Sec. 3012, sd. 3) requires the Tenure Commission to consider the appeal

"both as to law and fact". Because a majority of the members of the Tenure Commission are not lawyers, we have discussed the law with reluctance, fortified, however, by the knowledge that under the statute our conclusions are expressed in the form of a "recommendation" to the Commissioner of Education whose decision alone shall be "final".

For the foregoing reasons, the members of the Commission participating in this decision unanimously recommend that the determination of the Board be affirmed.

s/ JOHN T. DEGRAFF
s/ AGDA S. OSBORN
s/ DOROTHY B. BUNNELL
s/ ALFRED T. PETERS

Hon. William T. Conklin took no part in the consideration or determination of this appeal.

APPENDIX I

Decision of Board of Education

FRANKFORT-SCHUYLER CENTRAL SCHOOL

CENTRAL SCHOOL DISTRICT No. 2
TOWNS OF FRANKFORT AND SCHUYLER
Frankfort, New York

In the Matter of the Removal
of
PHILIP CHUFF
As a Teacher in Central School District No. 2 of the Towns of Frankfort and Schuyler.

The above entitled proceeding having been duly brought on for a hearing before the following member of the Board of Education of Central School District No. 2, Towns of Frankfort and Schuyler: Theodore D. Robinson; Angelo J. Reina; Bennie S. DiPiazza; Forrest E. Hobbick; William J. Barton; on the 9th, 10th, 11th, 16th, 17th, 18th, 19th, days of December, 1957, and both of the parties hereto having been represented by counsel, Albert L. Lawrence, Esq., Daniel J. Blaugrund, Esq., of counsel, appearing for proponent, and Fred J. O'Donnell, Esq. appearing for Philip Chuff, and the allegations and evidence of the parties having been heard and due deliberation having been had, it is the unanimous decision of the members of the Board of Education hearing this matter that the credible evidence sustains the charges and that said Philip Chuff, a teacher in Central School District No. 2 of the Towns of Frankfort

and Schuyler, be dismissed as a teacher in said school district.

Dated: Frankfort, New York, December 21st, 1957.

BOARD OF EDUCATION, CENTRAL SCHOOL DISTRICT NO. 2, TOWNS OF FRANKFORT AND SCHUYLER

THEODORE D. ROBINSON
President

BENNIE S. DIPIAZZA
WILLIAM J. BARTON
FORREST E. HOBBICK
ANGELO J. REINA

APPENDIX J

Notice of Hearing

STATE OF NEW YORK
COUNTY OF HERKIMER

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 2, TOWNS OF FRANKFORT AND SCHUYLER

In the Matter of the Removal
of
PHILIP CHUFF
As a Teacher in Central School District No. 2 of the Towns of Frankfort and Schuyler.

PLEASE TAKE NOTICE that upon the charges against you preferred by John F. Murphy, Superintendent of Schools of Central School District No. 2 of the Towns of Frankfort and Schuyler, Herkimer County, New York, a copy of which is annexed hereto, a hearing will be held before the Board of Education of Central School District No. 2, Towns of Frankfort and Schuyler, Herkimer County, New York, on Monday evening, at 7:00 P. M., December 9th, 1957, in the cafeteria room of the Frankfort High School, Palmer Street, Frankfort, New York, on the question of your removal as teacher in the school system of Central School District No. 2, Towns of Frankfort and Schuyler, Herkimer County, New York, pursuant to Section 3012 of the State Education Law. The reasons for such proposed removal or dismissal are set forth in a copy of charges

which are annexed hereto and incorporated herein, as if set forth in length.

PLEASE TAKE FURTHER NOTICE, that pending the determination of said charges, you are hereby suspended as of November 12, 1957.

PLEASE TAKE FURTHER NOTICE that your written answer to the said charges may be filed with the Board of Education of Central School District No. 2 of the Towns of Frankfort and Schuyler, Herkimer County, New York, no later than December 2nd, 1957.

Yours, etc.,

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 2, TOWNS OF FRANKFORT AND SCHUYLER, HERKIMER COUNTY, NEW YORK

By THEODORE D. ROBINSON
By BENNIE S. DIPIAZZA
By FORREST E. HOBBICK
By JOSEPH J. GRATES
By WILLIAM J. BARTON
By ANGELO J. REINA
By RONALD E. ALLEN

APPENDIX K

Charges

STATE OF NEW YORK
COUNTY OF HERKIMER

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 2, TOWNS OF FRANKFORT AND SCHUYLER

In the Matter of the Removal
of
PHILIP CHUFF
As a Teacher in Central School District No. 2 of the Towns of Frankfort and Schuyler.

JOHN F. MURPHY, as and for charges against Philip Chuff, alleges as follows:

1. I am the Superintendent of Schools of Central School District No. 2 of the Towns of Frankfort and Schuyler, Herkimer County, New York, and these charges are made for the purpose of seeking the removal of said Philip Chuff, a teacher in Central School District No. 2 of the Towns of Frankfort and Schuyler, pursuant to Section 3012, Subdivisions 2 and 3 of the State Education Law, on the grounds that said Philip Chuff has been and is guilty of inefficiency, incompetency, neglect of duties, insubordination and conduct unbecoming a teacher.

2. Upon information and belief, the said Philip Chuff has failed to keep adequate records as required by department regulations; has limited his program to development of a sports program with little regard to a physical educa-

tion program for all students; has consistently failed to organize and plan a program; has failed to keep adequate class room records; all of which has been contrary to explicit instructions of his superior and in direct violation of the rules and regulations of the State Department of Education. This allegation is based partly on my own knowledge and information and partly on knowledge and information imparted to me by the principal of the high school.

3. That said Philip Chuff has failed and neglected to perform his proper duties in a proper manner in the clearance of football equipment for conditioning purposes after the football season in 1956.

4. Upon information and belief, the said Philip Chuff has failed to follow through and insist on recognition of one of the basic fundamentals of physical education, namely cleanliness, in that he permitted gym shower and dressing room areas to be neglected by the students using same, contrary to instructions from his superiors, particularly in June, 1952, February, 1953 and February, 1956. That the source of my information and grounds of my belief are personal knowledge in part and statements made to me by the former Superintendent of Schools and board members and school board minutes of June, 1952.

5. That upon information and belief, the said Philip Chuff, contrary to the rules, regulations and instructions of his superior, established a policy which made it mandatory for all boys who wished to play basketball, to also go out for football. That the source of my information and grounds of my belief are the minutes of the Board of Education under date of November 1st, 1954, and statements made to me by individuals familiar with the aforementioned policy.

6. That upon information and belief Philip Chuff failed to provide the necessary supervision over the students under his control during the Fall of 1956, to the extent that is was necessary to formally notify him, of the lax conditions. That the source of my information and grounds of my belief were complaints made to me by individuals as a result of which the letter was directed to Mr. Chuff under date of September 28th, 1956, and the matter discussed in the minutes of the Board of Education on December 18th, 1956.

6a. That said Philip Chuff has failed and neglected to obey the orders of his superior and particularly an order given by the Superintendent of Schools on or about April 18th, 1956, that he discontinue the amount of running engaged in by male pupils during the physical education class, which matter was called to the Superintendent's attention by the Board of Education.

6b. That the said Philip Chuff disobeyed the order of the Superintendent of Schools in the Fall of 1956, which directed him not to allow students off the school premises during school hours not to run on the streets.

6c. Upon information and belief, during the months of January and February, 1955, the said Philip Chuff while in charge of gym classes would leave said class without supervision and would go to the boiler room to smoke. That the Superintendent of Schools at that time advised the said Philip Chuff to discontinue the practice of leaving the gym class unsupervised and smoking, but said Philip Chuff continued to do so in spite of the orders of his School Superintendent. That the source of my information and knowledge and grounds of my belief are statements made

to me by the Superintendent of Schools during January and February, 1955.

6d. That upon information and belief, during the Spring of 1955, while the said Philip Chuff was conducting gym classes outside of the building, he would leave his group in the field without supervision and go over to lean against the school building to smoke. That this matter was called to his attention by the Superintendent of Schools on four or five different occasions, but the said Philip Chuff continued, not only to disobey the orders of the Superintendent of Schools, but failed to properly supervise the classes and continued to smoke while in charge of a class. That the source of my information and knowledge and grounds of my belief are statements made to me by the Superintendent of Schoools during the Spring of 1955.

7. Upon information and belief, the said Philip Chuff, in violation of generally accepted practices, left his students under the supervision of people not authorized to supervise, contrary to direct instructions and specifically did not take the fourth period study hall on March 27th, 1957. That the source of my knowledge and information and grounds of my belief are personal knowledge and records compiled at the time by other officials of the school system.

8. That upon information and belief, the said Philip Chuff, in violation of direct instruction, failed to take his students outside for physical education in spite of good weather, particularly during the week of May 13th, 1957, but kept his students sitting in class without instruction. That the source of my knowledge and grounds of my belief are partly my own personal knowledge and records and statements made to school officials by competent individuals.

9. That said Philip Chuff during said week on May 13th, 1957, inflicted unreasonable punishment on several pupils by making them kneel on the floor.

10. That said Philip Chuff, contrary to specific instructions by his superior that all students and faculty members attend the Student Council Election Meeting on May 20th, 1957, failed to attend the greater portion of said meeting.

11. That upon information and belief, said Philip Chuff, while responsible for elementary physical education, failed to follow instructions of his immediate supervising administrator, specifically refusing to go on the gym floor area of the Sarah M. Piper School, although he sent pupils there for physical education purposes. That the source of my information and the grounds of my belief are statements made to me by the elementary school principal.

12. That upon information and belief, the said Philip Chuff, during September, 1954, while assigned by the Superintendent of Schools to assist during the noon hour program at elementary schools, refused to carry out the assignment, making it necessary to bring the matter before the Board of Education, and that on other occasions in 1948, he had refused to carry out his noon hour duty assignments, threatening to resign and requesting individuals to intercede for him. That the source of my information and the grounds of my belief are statements made to me by former Superintendent of Schools, former member of the Board of Education and the minutes of the Board of Education.

13. That said Philip Shuff knowingly violated the "Game Standards" of the New York State Public High School Athletic Association by scheduling and playing the first basketball game of the 1956-1957 season by having less

than "ten organized intraschool practice sessions before the first basketball game of the season," thereby indicating the attitude of said Philip Chuff to set up his own rules as a matter of convenience. That the source of my information the grounds of my belief are the regulations of the New York State Public High School Athletic Association, the practice schedules sessions and minutes of the Board of Education of December 18th, 1956.

14. Upon information and belief, the said Philip Chuff is unable to work with his co-teachers and co-workers in his field to the detriment of the physical education program of the school system. That the source of my information and grounds of my belief are conversations with fellow teachers in the school system.

15. That upon information and belief, that on October 22nd, 1957, Mr. Chuff, who at that time had no authority and was under suspension by the Board of Education, told students to report to the Reese Road Elementary School gym, although the school was closed under direction of the school physician, and is a further indication of the unauthorized authority assumed by Mr. Chuff, and a further indication of a practice of assigning his pupils to an unassigned program. That the source of my information and grounds of my belief are statements made by the principal of the Reese Road Elementary School and students of the high school.

16. That said Philip Chuff, in his petition to the Supreme Court of the State of New York dated September 24th, 1957, under oath, swore that there have never been any criticisms made or filed against him and no disciplinary action taken, no difficulty of any kind involving petitioner and the school board, whereas in truth and in

fact, Mr. Chuff knew at the time of signing said petition that he had been called before the Board of Education at a special meeting on December 18th, 1956, at which time he was openly criticised for the action which he was taking in matter of criticism and violation of school policy.

16a. That upon information and belief, the said Philip Chuff, on or about June 17th, 1955, after the release of the commencement programs, called a member of the Board of Education and falsely accused him of being up to his old tricks and caught in another lie, in that he, Chuff, should have been listed as Director of Athletics on the program. That the source of my knowledge and grounds of my belief are statements made to me by the former member of the Board of Education.

17. That Mr. Chuff, on or about February 27th, 1956, at a time when the Superintendent was in his third week in his new school system, exerted great pressure on the Superintendent in demanding that he be recommended for appointment as Director of Physical Education and Health and upon being advised that the request would have to be denied at that time, the said Mr. Chuff vehemently charged unfair treatment and discrimination.

18. That upon information and belief, during the course of his employment by the school system and particularly during the years 1955, 1956, 1957, the said Philip Chuff resorted to conduct unbecoming a teacher by constantly holding over the Board of Education threats of resignation and would, at these times, request letters of recommendation, which were given to the said Philip Chuff to placate him. That this action on the part of said Philip Chuff was for the purpose of harassing and embarrassing the Board of Education and creating a condition of uncertainty, vio-

lating one of the basic premises of the tenure law, namely, stability of staff personnel. That the source of my information and grounds of my belief are conversations with members of the Board of Education

19. Upon information and belief, the said Philip Chuff used offensive language and threats against non-teaching personnel and especially against bus personnel, particularly after the Sportsmen Outing in May of 1957. That the source of my information and grounds of my belief are conversations with Mr. Frank M. Plano, Jr., of Frankfort, New York.

20. Upon information and belief, the said Philip Chuff has engaged in conduct unbecoming a teacher in that he has at various times and places accosted members of the Board of Education and in the presence of others, severely criticised their program and particularly on December 6th, 1956, in the presence of faculty members, Mr. Chuff sharply criticised both the Board of Education and the Administration to the detriment of the school system with such comments as "The program is going backwards every day," and "He (Mr. Murphy, the Superintendent of Schools) allowed the use of ineligible players in football," and "The administration is not supporting me in basketball." That on December 14th, 1956, a similar outburst was made by said Chuff to a Board member that they made a mistake in hiring the new Superintendent, and he (Chuff) would fight him every inch of the way. Both of these outbursts were the objects of Board discussions and resulted in a special meeting being called under date of December 18, 1956. The source of my information and the grounds of my belief are conversations with former members of the Board of Education and the minutes of the Board meeting of December 18th, 1956.

21. That upon information and belief, the said Philip Chuff, during February of 1956, criticised members of the Board of Education in their thinking and action with respect to salary scale, then under consideration, stating that he considered the actions of the Board and Administration to be shortsighted and discriminatory. That the source of my information and grounds of my belief are conversations with former members of the Board of Education.

22. That upon information and belief, Mr. Philip Chuff has incorrectly maintained that he has not had support from the Board of Education in such a manner as to provide an adequate program, all to the detriment of the school system. That said statements were made to members of the Board of Education, particularly on December 6th, 1956, December 14th, 1956 and December 18th, 1956. That the source of my information and grounds of my belief are partly on my own knowledge, partly on conversations with others and partly from the records and reports in the school system.

23. That said Philip Chuff, on many occasions, and particularly on May 6th, 1957, in the Superintendent's office, directly and openly criticised the school organization and school operation in abusive and uncontrolled language.

24. That the said Philip Chuff is constantly and has repeatedly demonstrated an attitude of resisting the school program and attempting to belittle it and to be of as little assistance as possible, openly and publicly criticising the Board of Education and the school administrators, and particularly on December 14th, 1956, when he criticised the principal of the school and later left the school without the knowledge of the principal, and as a further indication of this attitude, the said Mr. Chuff resigned as football

coach just a few days before the opening of the football season in the Fall of 1956 without notice.

25. That upon information and belief, the said Philip Chuff in May or June, 1955, attempted to influence voting support at the annual meeting of the Board of Education, promising considerations, which would be beneficial to those people involved, disregarding the best interests of the school system, specifically stating that if his candidates were elected, he, Chuff, might be appointed Superintendent of Schools and would continue support of private bus contracts as against school owned buses. That the source of my information and grounds of my belief are the statements of individuals who have reported this to the Superintendent.

26. That upon information and belief, said Philip Chuff contrary to the rules and regulations of the school system left the school premises during school hours during the year of 1954, for the purpose of, among other things, attempting to influence members of the Board of Education against the then Superintendent of Schools. That the source of my information and grounds of my belief are statements made to me by members of the Board of Education.

27. Upon information and belief, the said Philip Chuff during the month of February, 1955, came to the office of the Superintendent of Schools and in a loud, boisterous and threatening voice accused the Superintendent of being unfair in rating him and advised the Superintendent that he would "get him for this." That the source of my information and knowledge and the grounds of my belief are statements made to me by the then Superintendent of Schools.

28. Upon information and belief, on or about the 2nd day of March, 1955, the said Philip Chuff broke into the office of the Superintendent of Schools, where the Superintendent and a member of the Board of Education were conferring, and violently and boisterously accused both of being prejudiced and preventing him from getting a raise. That is the course of the conversation, the said Philip Chuff pounded his fist upon the desk, threatened the member of the Board of Education and stated to him, "Your face ought to be slapped." That the source of my information and knowledge and grounds of my belief are statements made to me by the member of the Board of Education and and the Superintendent of Schools, who were present at the time.

29. That upon information and belief, on or about the 6th or 7th day of December, 1956, the said Philip Chuff, contrary to instructions that he check eligibility the early part of the week, went, the latter part of the week, to the office of the principal to check eligibility of players and charged the principal with inconsistency and partiality. That thereafter, said Mr. Chuff went to the office of the Superintendent repeating the same charges shortly thereafter returned to the Superintendent's office with a number of students and in the presence of students repeated the same charges and in the presence of said students stated that the administration had allowed the use of ineligible players in football. At that time, the said Mr. Chuff left the office with the threat that he was going to investigate the whole program. That the source of my information and knowledge and grounds of my belief are partly my own knowledge and partly statements made by the principal.

30. Upon information and belief, the said Philip Chuff violated the regulation of the State Department of Education of which he had notice on June 4th, 1956, with reference to the handling of extra curricular class room funds, particularly the accounts under the heading of Frankfort High Rifle Club and Sportsman's Club. That the source of my information and knowledge and grounds of my belief are partly my own knowledge and bank records.

31. That upon information and belief, the said Philip Chuff never merited nor received the recommendation of the Superintendent of Schools during the eleven years that he was employed in the school system, which recommendation as to competency and fitness was and is required by law. That the source of my information and grounds of my belief are records in the school system.

I hereby prefer the above charges for the removal of the said Philip Chuff pursuant to Section 3012. Subdivisions 2 and 3 of the State Education Law.

Dated: Frankfort, New York, November . , 1957.

JOHN F. MURPHY,
Superintendent of Schools,
Central School District No. 2.

Table of Contents.

	Page
Questions Presented for Review	1
Statement of the Case	2
POINT I. In the event that the proceedings before the Board of Education and Tenure Commission were such as to require findings of fact within the due process of law guarantee of the Fourteenth Amendment to the United States Constitution, such findings of fact were in effect made by both the Board of Education and the Tenure Commission	6
POINT II. Petitioner has not properly raised and preserved the objection that the proceedings before the Board of Education amounted to an infringement upon his guarantee of free speech and even if this question is to be considered the facts of this proceeding do not come within the sanctions of such constitutional guarantee	7
POINT III. This Court may not review the question of substantiality and sufficiency of evidence to support the administrative termination under the guise of an alleged violation of the guarantee of due process contained in the Fourteenth Amendment to the United States Constitution	9
CONCLUSION. For the foregoing reasons the petition for a writ of certiorari should be denied	11
APPENDIX A. Charges	13
APPENDIX B. Opinion of Tenure Commission	24

TABLE OF CASES CITED.

	Page
Atlantic Coast Line R. Co. v. North Carolina Corp. Commission N. C., 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933 (1907)	10
Chuff v. Board of Education, 6 A. D. 2d 987, 175 N. Y. S. 2d 936	3
Pickering v. Board of Education, U. S. , 88 Sup. Ct. 1731, 20 L. Ed. 2d 811 (1968)	8, 9

STATUTES CITED.

New York Civil Practice Act, Article 78	2, 3
New York Education Law, Section 3012	3

IN THE

Supreme Court of the United States

October Term, 1968.

No. .

PHILIP CHUFF,

Petitioner,

against

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT #2 OF THE TOWNS OF FRANKFORT AND SCHUYLER, and JOHN F. MURPHY, Superintendent of Schools of said Central School District, and JAMES E. ALLEN, Jr., Commissioner of Education of the State of New York,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the State of New York Supreme Court, Appellate Division, Third Judicial Department.

Respondent Board of Education of Central School District #2 of the Towns of Frankfort and Schuyler and John F. Murphy, Superintendent of Schools of said School District respectfully prays that the petition herein for a writ of certiorari to the State of New York Supreme Court, Appellate Division, Third Judicial Department be denied.

Questions Presented for Review.

1. Whether the procedures before the Board of Education and the Tenure Commission were such as to require findings of fact within due process of law as guar-

anteed by the Fourteenth Amendment to the United States Constitution and further whether or not the determinations of these agencies, if such was required, in fact, amount to the making of findings of fact?

2. Whether the petitioner has properly raised and preserved the objection to the proceedings before the Board of Education as being an infringement upon his guarantee of free speech, and if so whether or not the facts of this proceeding come within the sanctions of such free speech guarantee?

3. Whether or not this Court may review the question of substantiality and sufficiency of the evidence to support the administrative determination under the guise of an alleged violation of the guarantee of due process contained in the Fourteenth Amendment to the United States Constitution?

Statement of the Case.

This is a proceeding commenced originally pursuant to Article 78 of the (former) Civil Practice Act in the State of New York, whereby petitioner sought to review, on the merits, the decision of the Commissioner of Education in the State of New York, which decision resulted from a review and recommendation of the Tenure Commission, dismissing petitioner from his job as a physical education teacher in the respondent school system. The matter arose by reason of the fact that during the summer of 1957, and just prior to the commencement of school in the fall of that year, petitioner received a letter from the Superintendent of Schools where he was employed as a physical education teacher which letter suggested that he seek employment with another school district. Petitioner chose to ignore this letter and thereafter he was summarily suspended from his duties as

physical education teacher, after reporting for school and work in September of 1957. Inasmuch as formal written charges had not, and were not, at that time actually prepared and served upon petitioner, he was reinstated to his position by the Supreme Court, State of New York. See: *Chuff v. Board of Education*, 6 A. D. 2d 987, 175 N. Y. S. 2d 936.

Thereafter the respondent, Superintendent of Schools, preferred formal written charges against petitioner and pursuant thereto a hearing was had before the respondent, Board of Education, during December of 1957. Following this hearing petitioner was dismissed from his position as physical education teacher with the respondent, School District, by virtue of a unanimous decision of the five member school board, which determination was made on December 21, 1957. Thereafter petitioner filed a requisite notice of appeal, pursuant to the then existing provisions of Section 3012 of the Education Law, with the Tenure Commission, which notice of appeal was dated December 28, 1957, and which notice of appeal was received and filed by the Tenure Commission on or about January 4, 1958.

After a careful review of the matter, the Tenure Commission by a unanimous opinion, found that the respondent Board of Education was fully justified in its decision that petitioner be dismissed, and upon the recommendation of the Tenure Commission, the Commissioner of Education made an Order dated February 4, 1959, whereby the Commissioner found that there was no basis for the substitution of his judgment for that of the Board of Education and the Tenure Commission and, therefore, ordered the recommendation of the Tenure Commission affirmed.

The proceeding which petitioner now seeks to review was commenced pursuant to then Article 78 of the Civil

Practice Act, by Order to Show Cause dated May 27, 1959, which matter came on for a hearing in Supreme Court, Albany County, on June 29, 1959. A decision was rendered therein transferring this matter to the Appellate Division and thereafter an Order was made pursuant to such decision, which Order was dated January 4, 1960.

After the execution of such Order on or about January 4, 1960, absolutely no further proceedings were had in this matter until such Order was filed transferring this matter to the New York State Supreme Court, Appellate Division, Third Judicial Department on or about December 19, 1967.

The specification of charges as originally presented against petitioner numbered some thirty-one (31), and after listening to the witnesses and hearing evidence on the trial herein, the respondent, Board of Education, by unanimous decision of its five members, found that the allegations against petitioner had been substantiated and upon such findings of fact, dismissed petitioner from his position as physical education teacher.

Through the review of this matter by both the Tenure Commission and the Commissioner of Education, the conclusion remained the same although the Tenure Commission found that *only* twenty-two (22) of the thirty-one (31) separate and distinct charges had been substantiated. Of course, however, upon such a finding of fact, the Tenure Commission, by unanimous decision affirmed the respondent, Board of Education, and after a full review of the record and upon the recommendation of the Tenure Commission, the Commissioner of Education again upheld and affirmed the finding of the respondent, Board of Education.

Thereafter the Supreme Court of the State of New York, Appellate Division, Third Judicial Department made a full review of this matter and made its decision which petitioner seeks to review herein which decision established that the record as a whole contains substantial evidence which cumulatively warranted the dismissal of the petitioner and further established that the action of the Commissioner of Education was not arbitrary and/or capricious.

It was at this time upon the argument upon the merits in the New York State Supreme Court, Appellate Division, Third Judicial Department, that petitioner first raised any question as to the violation of his constitutional rights, particularly with regard to an alleged violation to his right of free speech.

Again petitioner has attempted to preserve this argument upon his application for leave to appeal to the Court of Appeals, made both to the New York State Supreme Court, Appellate Division, Third Judicial Department and to the New York Court of Appeals and both applications have been denied. Petitioner has attempted to show that the argument with regard to free speech was "raised in substance" by his attorney at the hearing in this matter. The record however, is devoid of any reference to alleged violation of such constitutional mandate until the proceedings had reached the New York State Supreme Court, Appellate Division, Third Judicial Department.

Whether or not the Appellate Courts in the State of New York both the Supreme Court of the State of New York, Appellate Division, Third Judicial Department and the New York Court of Appeals, considered the constitutional question is a moot point upon this review inasmuch as petitioner failed to raise this objection until he reached the appellate level in this matter.

POINT I.

In the event that the proceedings before the Board of Education and Tenure Commission were such as to require findings of fact within the due process of law guarantee of the Fourteenth Amendment to the United States Constitution, such findings of fact were in effect made by both the Board of Education and the Tenure Commission.

Petitioner has argued in the Appellate Courts of the State of New York and continues to argue the point that there was a failure of the Board of Education and the Tenure Commission in the State of New York to make findings of fact in order that this petitioner might properly present his case for review by the Appellate Courts and that such lack of findings of fact have prejudiced his constitutional rights under the guarantees of the Fourteenth Amendment to the United States Constitution.

The fact that petitioner consistently seems to overlook and that evidently both the State of New York Supreme Court, Appellate Division, Third Judicial Department and New York Court of Appeals considered is that findings of fact actually were made in this case both by the Board of Education and the Tenure Commission. The original charges in this regard amounted to thirty-one (31) separately stated and numbered charges (Appendix A). The decision of the Board of Education in effect found petitioner guilty of each and every one of these charges and, therefore, made findings of fact numbered one (1) through thirty-one (31). Thereafter the Tenure Commission proceeded to dismiss certain findings of fact being charges numbered eight (8), nine (9), sixteen (16), eighteen (18), nineteen (19), twenty-one (21), twenty-two (22), twenty-five (25) and thirty-one (31) (Appendix B). There seems to be little doubt

therefore, that the findings of fact of the Tenure Commission included the facts set forth in the remaining twenty-two charges concerning which that body found to have been substantiated.

It is therefore, respectfully submitted that even if the procedures before the Board of Education were such as to require findings of fact, such specific findings of fact were made and were known to petitioner from the time of service of the specific charges upon him and such findings of fact were also made known to him by the decision of the Tenure Commission in that the twenty-two charges found to be substantiated were in effect the findings of fact of the Review Board.

POINT II.

Petitioner has not properly raised and preserved the objection that the proceedings before the Board of Education amounted to an infringement upon his guarantee of free speech and even if this question is to be considered the facts of this proceeding do not come within the sanctions of such constitutional guarantee.

The record in this matter both before the Board of Education and the Tenure Commission demonstrates conclusively that at no time during these preliminary proceedings or the inception of this matter did petitioner ever raise an objection with regard to a violation of his constitutional right of free speech. The first and initial time that any objection was raised in this regard did not come about until after the more than seven year lapse in these proceedings when these proceedings were in effect abandoned by petitioner in 1961 and by his then attorney. When petitioner, in late 1967 and early 1968 retained another attorney and continued

on with his proceedings. His new counsel attempted at that time to raise the question of a violation of his right of free speech. Obviously this objection is an afterthought and an attempt by petitioner's newly retained counsel to inject an argument into these proceedings which had not been raised at the outset.

It is therefore, respectfully submitted that any issue in this regard cannot be considered at this time. It is further respectfully submitted that this may very well be the reason why both the New York State Supreme Court, Appellate Division, Third Judicial Department and the New York Court of Appeals made no mention of this argument in any of their decisions dismissing this matter both with regard to the appeal on the merits and applications for leave to appeal to the New York Court of Appeals.

In addition petitioner's reliance on the *Pickering* case is blatantly unfounded for two reasons.

In the first instance petitioner has attempted to rely on charges twenty-one (21), twenty-two (22) and twenty-five (25) as supporting his contention concerning the violation of the free speech mandate. There seems to be no questions but that the decision on appeal in this matter did not include a consideration of these charges inasmuch as they were dismissed by the Tenure Commission.

In the second instance it is respectfully submitted that the case of *Pickering v. Board of Education*, U. S. , 88 Sup. Ct. 1731, 20 L. Ed. 2d 811 (1968), is certainly not controlling and as a matter of fact may be distinguished from the instant case. The *Pickering* case related to a teacher's exercise of his right to speak out upon issues of public importance. Such was not and is not the case insofar as the petitioner in the instant case is concerned, inasmuch as all of the matters

concerning which the petitioner was charged and which were considered by the Appellate Court in this case, and which had a bearing on the issues herein, concerned matters of internal administration, discipline and order within the school system, and particularly within the school in which petitioner was a teacher. In the case at bar, the petitioner was attempting to speak out upon matters which were not issues of public importance related to the district as a whole or matters of district policy, but which were related to internal policy matters and teaching procedures. As to these matters, petitioner was attempting to substitute his judgment for those of his duly appointed superiors and, in effect, petitioner was attempting to run the administration and teaching procedures of the school to his own liking by reason of the fact that he disapproved of those who were making such decisions and governing such teaching procedures.

Consequently, it is respectfully submitted that the *Pickering* case has no bearing in this matter and that petitioner's argument concerning an alleged violation of his right to free speech must be disregarded.

POINT III.

This Court may not review the question of substantiality and sufficiency of evidence to support the administrative termination under the guise of an alleged violation of the guarantee of due process contained in the Fourteenth Amendment to the United States Constitution.

Petitioner has attempted upon this application to have this Court review the question of the substantiality and sufficiency of the evidence before the Board of Educa-

tion by alleging that the determination in this regard amounted to a violation of his rights under the Fourteenth Amendment to the United States Constitution.

It is respectfully submitted that this subterfuge by the petitioner is an attempt to circumvent the applicable law in this regard which has long been established in the Federal Courts.

It has long been the rule that the Federal Court may not review the alleged arbitrariness or unreasonableness of a state administrative decision inasmuch as such issue is a matter of local and not federal consideration. *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, N. C.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933 (1907).

It is further respectfully submitted that this *local question* has been reviewed and re-reviewed by the proceedings in the New York State Appellate Tribunals commencing with the review by the Tenure Commission, the Commissioner of Education, the New York State Supreme Court Appellate Division and thereafter upon two applications for leave to appeal to the New York State Court of Appeals, one having been made to the New York State Court of Appeals, one having been made to the New York State Supreme Court, Appellate Division, Third Judicial Department and one having been made to the New York State Court of Appeals. Such local question having been exhaustively reviewed by the Appellate Tribunals having proper jurisdiction and regard for these questions, the long-standing rule established by the *Atlantic Coast Line R. Co.* case must respectfully be adhered to and petitioner's contention in this regard dismissed.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE H. GETMAN,
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ALBERT L. LAWRENCE,
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CHARLES E. CRANDALL, JR.,
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APPENDIX A.

Charges.

STATE OF NEW YORK

COUNTY OF HERKIMER

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 2, TOWNS OF FRANKFORT AND SCHUYLER

IN THE MATTER

of

The Removal of PHILIP CHUFF as a Teacher in Central School District No. 2 of the Towns of Frankfort and Schuyler.

JOHN F. MURPHY, as and for charges against Philip Chuff, alleges as follows:

1. I am the Superintendent of Schools of Central School District No. 2 of the Towns of Frankfort and Schuyler, Herkimer County, New York, and these charges are made for the purpose of seeking the removal of said Philip Chuff, a teacher in Central School District No. 2 of the Towns of Frankfort and Schuyler, pursuant to Section 3012, Subdivisions 2 and 3 of the State Education Law, on the grounds that said Philip Chuff has been and is guilty of inefficiency, incompetency, neglect of duties, insubordination and conduct unbecoming a teacher.

2. Upon information and belief, the said Philip Chuff has failed to keep adequate records as required by department regulations; has limited his program to development

of a sports program with little regard to a physical education program for all students; has consistently failed to organize and plan a program; has failed to keep adequate class room records; all of which has been contrary to explicit instructions of his superior and in direct violation of the rules and regulations of the State Department of Education. This allegation is based partly on my own knowledge and information and partly on knowledge and information imparted to me by the principal of the high school.

3. That said Philip Chuff has failed and neglected to perform his proper duties in a proper manner in the clearance of football equipment for conditioning purposes after the football season in 1956.

4. Upon information and belief, the said Philip Chuff has failed to follow through and insist on recognition of one of the basic fundamentals of physical education, namely cleanliness, in that he permitted gym shower and dressing room areas to be neglected by the students using same, contrary to instructions from his superiors, particularly in June, 1952, February, 1953 and February, 1956. That the source of my information and grounds of my belief are personal knowledge in part and statements made to me by the former Superintendent of Schools and board members and school board minutes of June, 1952.

5. That upon information and belief, the said Philip Chuff, contrary to the rules, regulations and instructions of his superior, established a policy which made it mandatory for all boys who wished to play basketball, to also go out for football. That the source of my information and grounds of my belief are the minutes of the Board of Education under date of November 1st, 1954, and statements made to me by individuals familiar with the aforementioned policy.

6. That upon information and belief Philip Chuff failed to provide the necessary supervision over the students under his control during the Fall of 1956, to the extent that it was necessary to formally notify him, of the lax conditions. That the source of my information and grounds of my belief were complaints made to me by individuals as a result of which the letter was directed to Mr. Chuff under date of September 28th, 1956, and the matter discussed in the minutes of the Board of Education on December 18th, 1956.

6a. That said Philip Chuff has failed and neglected to obey the orders of his superior and particularly an order given by the Superintendent of Schools on or about April 18th, 1956, that he discontinue the amount of running engaged in by male pupils during the physical education class, which matter was called to the Superintendent's attention by the Board of Education.

6b. That the said Philip Chuff disobeyed the order of the Superintendent of Schools in the Fall of 1956, which directed him not to allow students off the school premises during school hours not to run on the streets.

6c. Upon information and belief, during the months of January and February, 1955, the said Philip Chuff while in charge of gym classes would leave said class without supervision and would go to the boiler room to smoke. That the Superintendent of Schools at that time advised the said Philip Chuff to discontinue the practice of leaving the gym class unsupervised and smoking, but said Philip Chuff continued to do so in spite of the orders of his School Superintendent. That the source of my information and knowledge and grounds of my belief are statements made to me by the Superintendent of Schools during January and February, 1955.

6d. That upon information and belief, during the Spring of 1955, while the said Philip Chuff was conducting gym classes outside of the building, he would leave his group in the field without supervision and go over to lean against the school building to smoke. That this matter was called to his attention by the Superintendent of Schools on four or five different occasions, but the said Philip Chuff continued, not only to disobey the orders of the Superintendent of Schools, but failed to properly supervise the classes and continued to smoke while in charge of a class. That the source of my information and knowledge and grounds of my belief are statements made to me by the Superintendent of Schools during the Spring of 1955.

7. Upon information and belief, the said Philip Chuff, in violation of generally accepted practices, left his students under the supervision of people not authorized to supervise, contrary to direct instructions and specifically did not take the fourth period study hall on March 27th, 1957. That the source of my knowledge and information and grounds of my belief are personal knowledge and records compiled at the time by other officials of the school system.

8. That upon information and belief, the said Philip Chuff, in violation of direct instruction, failed to take his students outside for physical education in spite of good weather, particularly during the week of May 13th, 1957, but kept his students sitting in class without instruction. That the source of my knowledge and grounds of my belief are partly my own personal knowledge and records and statements made to school officials by competent individuals.

9. That said Philip Chuff during said week on May 13th, 1957, inflicted unreasonable punishment on several pupils by making them kneel on the floor.

10. That said Philip Chuff, contrary to specific instructions by his superior that all students and faculty members attend the Student Council Election Meeting on May 20th, 1957, failed to attend the greater portion of said meeting.

11. That upon information and belief, said Philip Chuff, while responsible for elementary physical education, failed to follow instructions of his immediate supervising administrator, specifically refusing to go on the gym floor area of the Sarah M. Piper School, although he sent pupils there for physical education purposes. That the source of my information and the grounds of my belief are statements made to me by the elementary school principal.

12. That upon information and belief, the said Philip Chuff, during September, 1954, while assigned by the Superintendent of Schools to assist during the noon hour program at elementary schools, refused to carry out the assignment, making it necessary to bring the matter before the Board of Education, and that on other occasions in 1948, he had refused to carry out his noon hour duty assignments, threatening to resign and requesting individuals to intercede for him. That the source of my information and the grounds of my belief are statements made to me by former Superintendent of Schools, former member of the Board of Education and the minutes of the Board of Education.

13. That said Philip Chuff knowingly violated the "Game Standards" of the New York State Public High School Athletic Association by scheduling and playing the first basketball game of the 1956-1957 season by having less than "ten organized intraschool practice sessions before the first basketball game of the season," thereby indicating the attitude of said Philip Chuff to set up his own rules as a matter of convenience. That the source of my information the grounds of my belief are the regulations

of the New York State Public High School Athletic Association, the practice schedules sessions and minutes of the Board of Education of December 18th, 1956.

14. Upon information and belief, the said Philip Chuff is unable to work with his co-teachers and co-workers in his field to the detriment of the physical education program of the school system. That the source of my information and grounds of my belief are conversations with fellow teachers in the school system.

15. That upon information and belief, that on October 22nd, 1957, Mr. Chuff, who at that time had no authority and was under suspension by the Board of Education, told students to report to the Reese Road Elementary School gym, although the school was closed under direction of the school physician, and is a further indication of the unauthorized authority assumed by Mr. Chuff, and a further indication of a practice of assigning his pupils to an unassigned program. That the source of my information and grounds of my belief are statements made by the principal of the Reese Road Elementary School and students of the high school.

16. That said Philip Chuff, in his petition to the Supreme Court of the State of New York dated September 24th, 1957, under oath, swore that there have never been any criticisms made or filed against him, and no disciplinary action taken, no difficulty of any kind involving petitioner and the school board, whereas in truth and in fact, Mr. Chuff knew at the time of signing said petition that he had been called before the Board of Education at a special meeting on December 18th, 1956, at which time he was openly criticised for the action which he was taking in matter of criticism and violation of school policy.

16a. That upon information and belief, the said Philip Chuff, on or about June 17th, 1955, after the release of

the commencement programs, called a member of the Board of Education and falsely accused him of being up to his old tricks and caught in another lie, in that he, Chuff, should have been listed as Director of Athletics on the program. That the source of my knowledge and grounds of my belief are statements made to me by the former member of the Board of Education.

17. That Mr. Chuff, on or about February 27th, 1956, at a time when the Superintendent was in his third week in his new school system, exerted great pressure on the Superintendent in demanding that he be recommended for appointment as Director of Physical Education and Health and upon being advised that the request would have to be denied at that time, the said Mr. Chuff vehemently charged unfair treatment and discrimination.

18. That upon information and belief, during the course of his employment by the school system and particularly during the years 1955, 1956, 1957, the said Philip Chuff resorted to conduct unbecoming a teacher by constantly holding over the Board of Education threats of resignation and would, at these times, request letters of recommendation, which were given to the said Philip Chuff to placate him. That this action on the part of said Philip Chuff was for the purpose of harassing and embarrassing the Board of Education and creating a condition of uncertainty, violating one of the basic premises of the tenure law, namely, stability of staff personnel. That the source of my information and grounds of my belief are conversations with members of the Board of Education.

19. Upon information and belief, the said Philip Chuff used offensive language and threats against non-teaching personnel and especially against bus personnel, particularly after the Sportsmen Outing in May of 1957. That the source of my information and grounds of my belief are conversations with Mr. Frank M. Plano, Jr., of Frankfort, New York.

20. Upon information and belief, the said Philip Chuff has engaged in conduct unbecoming a teacher in that he has at various times and places accosted members of the Board of Education and in the presence of others, severely criticised their program and particularly on December 6th, 1956, in the presence of faculty members, Mr. Chuff sharply criticised both the Board of Education and the Administration to the detriment of the school system with such comments as "The program is going backwards every day," and "He (Mr. Murphy, the Superintendent of Schools) allowed the use of ineligible players in football," and "The administration is not supporting me in basketball." That on December 14th, 1956, a similar outburst was made by said Chuff to a Board member that they made a mistake in hiring the new Superintendent, and he (Chuff) would fight him every inch of the way. Both of these outbursts were the objects of Board discussions and resulted in a special meeting being called under date of December 18, 1956. The source of my information and the grounds of my belief are conversations with former members of the Board of Education and the minutes of the Board meeting of December 18th, 1956.

21. That upon information and belief, the said Philip Chuff, during February of 1956, criticised members of the Board of Education in their thinking and action with respect to salary scale, then under consideration, stating that he considered the actions of the Board and Administration to be shortsighted and discriminatory. That the source of my information and grounds of my belief are conversations with former members of the Board of Education.

22. That upon information and belief, Mr. Philip Chuff has incorrectly maintained that he has not had support from the Board of Education in such a manner as to provide an adequate program, all to the detriment of the school system. That said statements were made to mem-

bers of the Board of Education, particularly on December 6th, 1956, December 14th, 1956 and December 18th, 1956. That the source of my information and grounds of my belief are partly on my own knowledge, partly on conversations with others and partly from the records and reports in the school system.

23. That said Philip Chuff, on many occasions, and particularly on May 6th, 1957, in the Superintendent's office, directly and openly criticised the school organization and school operation in abusive and uncontrolled language.

24. That the said Philip Chuff is constantly and has repeatedly demonstrated an attitude of resisting the school program and attempting to belittle it and to be of as little assistance as possible, openly and publicly criticising the Board of Education and the school administrators, and particularly on December 14th, 1956, when he criticised the principal of the school and later left the school without the knowledge of the principal, and as a further indication of this attitude, the said Mr. Chuff resigned as football coach just a few days before the opening of the football season in the Fall of 1956 without notice.

25. That upon information and belief, the said Philip Chuff in May or June, 1955, attempted to influence voting support at the annual meeting of the Board of Education, promising considerations, which would be beneficial to those people involved, disregarding the best interests of the school system, specifically stating that if his candidates were elected, he, Chuff, might be appointed Superintendent of Schools and would continue support of private bus contracts as against school owned buses. That the source of my information and grounds of my belief are the statements of individuals who have reported this to the Superintendent.

26. That upon information and belief, said Philip Chuff contrary to the rules and regulations of the school system

left the school premises during school hours during the year of 1954, for the purpose of, among other things, attempting to influence members of the Board of Education against the then Superintendent of Schools. That the source of my information and grounds of my belief are statements made to me by members of the Board of Education.

27. Upon information and belief, the said Philip Chuff during the month of February, 1955, came to the office of the Superintendent of Schools and in a loud, boisterous and threatening voice accused the Superintendent of being unfair in rating him and advised the Superintendent that he would "get him for this." That the source of my information and knowledge and the grounds of my belief are statements made to me by the then Superintendent of Schools.

28. Upon information and belief, on or about the 2nd day of March, 1955, the said Philip Chuff broke into the office of the Superintendent of Schools, where the Superintendent and a member of the Board of Education were conferring, and violently and boisterously accused both of being prejudiced and preventing him from getting a raise. That is the course of the conversation, the said Philip Chuff pounded his fist upon the desk, threatened the member of the Board of Education and stated to him, "Your face ought to be slapped." That the source of my information and knowledge and grounds of my belief are statements made to me by the member of the Board of Education and the Superintendent of Schools, who were present at the time.

29. That upon information and belief, on or about the 6th or 7th day of December, 1956, the said Philip Chuff, contrary to instructions that he check eligibility the early part of the week, went, the latter part of the week, to the office of the principal to check eligibility of players and

charged the principal with inconsistency and partiality. That thereafter, said Mr. Chuff went to the office of the Superintendent repeating the same charges shortly thereafter returned to the Superintendent's office with a number of students and in the presence of students repeated the same charges and in the presence of said students stated that the administration had allowed the use of ineligible players in football. At that time, the said Mr. Chuff left the office with the threat that he was going to investigate the whole program. That the source of my information and knowledge and grounds of my belief are partly my own knowledge and partly statements made by the principal.

30. Upon information and belief, the said Philip Chuff violated the regulation of the State Department of Education of which he had notice on June 4th, 1956, with reference to the handling of extra curricular class room funds, particularly the accounts under the heading of Frankfort High Rifle Club and Sportsman's Club. That the source of my information and knowledge and grounds of my belief are partly my own knowledge and bank records.

31. That upon information and belief, the said Philip Chuff never merited nor received the recommendation of the Superintendent of Schools during the eleven years that he was employed in the school system, which recommendation as to competency and fitness was and is required by law. That the source of my information and grounds of my belief are records in the school system.

I hereby prefer the above charges for the removal of the said Philip Chuff pursuant to Section 3012. Subdivisions 2 and 3 of the State Education Law.

Dated: Frankfort, New York, November , 1957.

JOHN F. MURPHY,
Superintendent of Schools,
Central School District No. 2.

APPENDIX B.

Opinion of Tenure Commission.

STATE TENURE COMMISSION

IN THE MATTER

of

The Removal of PHILIP CHUFF, as a Teacher in Central School District #2 of the Towns of Frankfort and Schuyler.

Argued June 30, 1958.

Commissioners:

John T. DeGraff, *Chairman,*
Mrs. Robert Curtis Osborn,
Mrs. Homer Bunnell,
William T. Conklin,
Alfred T. Peters.

Appearances:

Fred J. O'Donnell, Attorney for Appellant.
Albert L. Lawrence, Attorney for School District, Daniel J. Blaugrund, of Counsel.

RECOMMENDATION

This is an appeal, pursuant to Section 3012 of the Education Law, from a determination of the Board of Education of Central School District #2 of the Towns of Frankfort and Schuyler, dismissing the appellant, Philip Chuff, as a teacher in said School District. The unanimous de-

termination of the five members of the Board who conducted the hearing, was made on December 31, 1957, following hearings held on December 9, 10, 11, 16, 17, 18 and 19, 1957. The notice of appeal, dated December 28, 1957, was received by the Tenure Commission on or about January 4, 1958.

The Tenure Commission was notified in a letter from the attorney for the petitioner, dated January 15, 1958, that the preparation of the transcript of the testimony taken before the Board would be delayed and that the Tenure Commission would be informed of the date of completion of the record so that a hearing could then be scheduled. The Commission was subsequently informed, by letter dated June 5, 1958, that the record had been completed and that the parties were ready to proceed with the hearing.

The hearing was held in Albany on June 30, 1958 and the issues were argued by Fred J. O'Connell, Esq., 53 West Street, Ilion, New York, on behalf of appellant, and by Daniel J. Blaugrund, Esq., 273 West Main Street, Herkimer, New York on behalf of respondent.

Before the hearing, the attorneys for the respective parties stipulated as follows:

1. That the provisions of Section 3012 of the Education Law, which require that the hearing before the Tenure Commission shall be held "not less than ten nor more than thirty days after notice of such an appeal has been received" are waived by the respective parties and the parties consent that the hearing be held on June 30, 1958.

2. That the issues may be submitted to and determined by the full membership of the Tenure Commission, despite the inability of two members to attend the hearing, on the basis of the record filed with the Tenure Commission as hereinafter set forth in paragraph 4.

3. That any time limitations that might exist in relation to the filing of the determination of the Tenure Commission are waived by the parties who expressly agree that the Tenure Commission may have such time as may be necessary for the filing of its recommendations with the Commissioner of Education.

4. That the issues are to be submitted to and determined by the Tenure Commission on the following record as submitted by the respective parties:

a. Notice of Appeal;

b. Charges;

c. Notice of suspension;

d. Answer;

e. Decision;

f. Transcript of testimony before the school board;

g. Plaintiff's exhibits numbered 1 to 23 inclusive;

h. Defendant's exhibits numbered A to V inclusive (Defendant's Exhibit W could not be found by either of the parties to the appeal).

The proceeding which is the subject of this appeal was initiated by charges dated November 7, 1957, made by John F. Murphy, Superintendent of Schools of Central School District No. 2. They comprise thirty-six separate numbered allegations characterized as "charges". Charges 1 and 2 are general in nature. The others are specific and could more properly be termed specifications in support of the general allegations contained in the first two charges.

The first charge alleges that appellant was guilty of inefficiency, incompetency, neglect of duties, insubordination, and conduct unbecoming a teacher.

The second charge alleges appellant's failure to keep adequate records as required by department regulations; his failure to develop a physical education program for all students; his consistent failure to organize and plan a program; his failure to keep classroom records; all of which, it is alleged, has been contrary to explicit instructions of his superior and in direct violation of the rules and regulations of the State Department of Education. The detailed specifications in support of these general charges are set forth in the remaining 34 allegations which refer to specific acts or incidents too numerous to summarize here.

On November 29, 1957, the appellant served an answer containing fifteen numbered paragraphs which, in substance, denied the charges and alleged that they were insufficient as a matter of law.

We have carefully reviewed the record on appeal, as stipulated by the parties, including the 45 exhibits and the testimony of the witnesses which takes up about 488 pages of the typewritten transcript.

We find that some of the charges are insufficient as a matter of law, unsubstantial, or not established by competent evidence. The basic charges are, nevertheless, supported by abundant evidence and we are of the unanimous opinion that the Board was fully justified in its decision that the teacher should be dismissed.

The charge that the teacher had not acquired tenure (Charge 31) was manifestly erroneous and insufficient on its fact as a matter of law. The continued employment of the teacher after the conclusion of his three years probationary term operated to give him tenure, as a matter of law, despite the fact that the superintendent of schools failed to recommend him for tenure.

Matter of Appeal of Eulalie Mary Sanders—(1951) 72 St. Dept. (Educ. 39).

Charges which we regard as unsubstantial or which were not established by competent evidence include those numbered 8, 9, 16, 18, 19, 21, 22 and 25. Although we feel that a few of the charges should have been dismissed by the Board and that some others were somewhat broader than the proof, the fact remains that most of the charges involved matters of substance and this record contains ample evidence to justify the Board in dismissing this teacher for insubordination, neglect of duty, failure to maintain required records, and conduct unbecoming a teacher. Indeed, several of the charges are substantiated in whole or in part by the appellant's own testimony.

The record as a whole discloses a continued refusal to follow orders and directives coupled with an attitude of long standing on the part of the appellant that was prejudicial to the orderly conduct of the school system (*Matter of Catone v. Hopkins*, 6 A. D. [2d] 972).

The appellant's attorney argues that the decision of the Board is defective because it "does not constitute a finding of guilt" and also because it contains no formal "findings". It is true, as appellant's attorney points out, that findings have been required by the Courts on certain proceedings to review the determination of administrative or quasi-judicial agencies.

N. Y. Water Service Corp. v. Water Power & Control Com., 283 N. Y. 23, 29;
Matter of Guernsey Breeders Co-op. v. Noyes, 284 N. Y. 197;
Matter of Elite Dairy Produces, Inc., v. Ten Eyck, 271 N. Y. 488;
Matter of Barry v. O'Connell, 303 N. Y. 46;
Matter of Fink v. Cole, 1 N. Y. 2d 48.

Findings were required in *Matter of Wood v. Board of Education*, 267 App. Div. 959. That case involved the dismissal of a teacher under Section 2573 of the Education

Law where the statute (sd. 6) specifically authorizes review by a proceeding under C.P.A. Article 78. The time limitations in the statute under which this appeal is taken (Education Law, Sec. 3012) do not seem to contemplate formal findings by the Board. Sd. 3 of Section 3012 declares:

> "After each side has completed its case at the hearing, the board of education may by a majority vote dismiss said teacher from its service or may defer action regarding the decision for a period not to exceed five days."

Whether formal findings shall be required seems to depend, according to the reported decisions, on the nature of the issue to be reviewed. Findings are not mandatory in all courts or in all administrative agencies. (Powers of the New York Court of Appeals, by Cohen and Karger, Sec. 132, pg. 542). We know of no reported decisions which require findings on a review by an administrative agency such as the Tenure Commission, as distinguished from a review by the Court.

With the exceptions hereinafter noted, we know of no reported decisions which require formal findings in disciplinary or removal proceedings under Sec. 3012 of the Education Law or the comparable provisions in Section 22 of the Civil Service Law. The general rule in such cases is whether there is "substantial" evidence to support the determination under review.

Matter of Miller v. Kling, 291 N. Y. 65;
Matter of Leeman v. O'Connell, 281 App. Div. 299, 300;
Matter of Harvey v. Catherwood, 268 App. Div. 1016, aff'd 295 N. Y. 843.
Powers of the New York Court of Appeals by Cohan and Karger, Sec. 108, pg. 460.

The Appellate Division, Third Department, has recently held, however, that findings may be required when the issue under review is whether the appellant has suffered "an excessive penalty" (C.P.A. Sec. 1296, sd. 5-a enacted by Laws of 1955, ch. 661); *Matter of Stotz v. Board of Regents*, 4 A. D. 2d 361; *Matter of Piper v. Lubin*, 4 A. D. 2d 612. In both of these cases, the Court adopted the rule that "* * * we cannot insist upon a statement of reasons when there is not apparent disproportion between the nature of the offense and the extent of the punishment" (p. 365).

No such disproportion exists in the case now before us where the charges and the evidence in the record abundantly justified the penalty of dismissal. Under such circumstances, we do not believe that formal findings by the Board are essential to an adequate review of the issues.

We find no merit in the other objections in point of law raised by appellant's attorney. We feel that these objections are so lacking in substance that they do not require discussion other than to mention that the Commission has considered and rejected the appellant's contentions that (1) the charges are insufficient on their face as a matter of law; (2) that the Board had no jurisdiction to entertain the proceeding or to hold a hearing on such charges; (3) that the decision of the Board is jurisdictionally defective in form; (4) that the Board divested itself of jurisdiction by failing to render a proper decision within five days after the hearing (the decision was handed down two days after the conclusion of the hearings); (5) that the Tenure Commission has jurisdiction to hear this appeal, but that there is nothing for the Tenure Commission to review.

We have entered into the foregoing discussion of the law because the statute (Education Law, Sec. 3012, sd. 3) requires the Tenure Commission to consider the appeal "both as to law and fact". Because a majority of the

members of the Tenure Commission are not lawyers, we have discussed the law with reluctance, fortified, however, by the knowledge that under the statute our conclusions are expressed in the form of a "recommendation" to the Commissioner of Education whose decision alone shall be "final".

For the foregoing reasons, the members of the Commission participating in this decision unanimously recommend that the determination of the Board be affirmed.

s/ JOHN T. DEGRAFF
s/ AGDA S. OSBORN
s/ DOROTHY B. BUNNELL
s/ ALFRED T. PETERS

Hon. William T. Conklin took no part in the consideration or determination of this appeal.